TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~957.~~ ~~[illegible]~~ 33646

JOHN G. WILLIAMS, Administrator *de bonis non* of FRANCIS TAYLOR, deceased, Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Filed June 11. 185

INDEX.

		Original.	Print.
I.	Minute by the clerk	1	1
II.	Petition of John G. Williams, adm'r *de bonis non* of Francis Taylor, filed April 18, 1878	2	1
III.	Traverse, filed May 6, 1878	5	4
IV.	Special plea, filed by deft's May 6, 1878	6	4
V.	Special plea, filed by deft's May 6, 1878	7	4
VI.	Replication, filed by claimant May 20, 1878	8	5
VII.	Judgment of the court, entered June 7, 1880	10	6
VIII.	Minute of the clerk	11	6
IX.	Amended findings of fact and conclusions of law, filed by the court in the stead of the original findings and conclusions, M'ch 14, 1887	12	6
X.	Opinion of the court	18	12
XI.	Order of May 16, 1887, and final judgment, entered as of M'ch 14, 1887	26	23
XII.	Motion of claimant to amend findings of fact, with rulings of court thereon, filed M'ch 14, 1887	27	23
XIII.	Application of claimant for and allowance of appeal,	32	25
XIV.	Certificate	33	26

W. H. MOORE, PRINTER, WASHINGTON.

1 In the Court of Claims.

GEORGE TAYLOR JENKINS and others
vs.
THE UNITED STATES.
No. 2186.

I. *Minute by the Clerk.*

The original petition in this case was filed by George Taylor Jenkins and others December 8th, 1865.

Defendants filed a traverse November 1, 1866.

By leave of court the claimants filed an amended petition March 26, 1867.

Defendants filed answers to amended petition March 30, 1868.

Defendants filed a special plea May 30, 1868.

The case was argued and submitted June 10, 1868.

Judgment was rendered June 15, 1868, dismissing the petition.

A motion for a new trial was filed by claimant December 15, 1868, and a new trial allowed December 13, 1869.

An amended petition was filed by leave of court December 1, 1877.

Defendants filed a traverse Dec. 12, 1877.

2 On motion, court ordered that John G. Williams, as administrator *de bonis non* of Francis Taylor, be substituted as party claimant, February 28th, 1878.

II. *Petition of John G. Williams, administrator de bonis non of Francis Taylor.* Filed April 18, 1878.

To the Honorable Court of Claims:

The petition of John G. Williams respectfully showeth—

That your petitioner is a resident of Orange Court House, State of Virginia, and that he is the administrator *de bonis non* with the will annexed, of Colonel Francis Taylor, of Orange, of the Virginia Line on Continental Establishment, in the War of the Revolution.

That said Colonel Francis Taylor of Orange county, in the State of Virginia, entered the military service of the United States in the year 1775; that he continued in said service, either on duty or as supernumerary, and liable to be ordered on duty at any time, until the end of the war in 1783; that it was resolved by Congress October 21st, 1780, (see Journal of Congress, Vol. III, pp. 538, 539,) "that the officers who shall continue in the service to the end of the war shall be entitled to half-pay during life, to commence from the time of their reduction;" that it was further

resolved by Congress March 22d, 1783, (See *ibid.*, Vol. IV, pp. 178, 179,) "that such officers as are now in the service, and shall continue therein until the end of the war, shall be entitled to
3 receive the amount of five years' full pay, in money or securities, on interest at six per cent. per annum, as Congress shall find most convenient, instead of the half-pay promised for life by the resolution of the 21st day of October, 1780; the said securities to be such as shall be given to other creditors of the United States, provided it be at the option of the lines of the respective States, and not of officers individually in those lines, to accept or refuse the same; and provided, also, that their election shall be signified to Congress through the commander-in chief, from the lines under his immediate command, within two months, and through the commanding officer of the Southern army, from those under his command, within six months from the date of this resolution;" that the Virginia line formally accepted the five years' full pay in lieu of half-pay for life, according to the terms of the proviso in the resolution last above recited. (See *ibid*, Vol. IV, p. 311.)

"The Secretary of War reported that the following lines, corps, and individuals have agreed to accept the commutation of five years' pay, in lieu of the half-pay for life, as appears by the papers accompanying his report: The lines of New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia;" * * * that it was still further resolved by Congress June 3d, 1874, (see *ibid.*, Vol. IV, p. 178,) "that an interest of six per cent. per annum shall be allowed to all creditors of the United States for supplies furnished or services done from the time that the payment became due;" that the said Col. Francis Taylor was entitled, under the foregoing resolutions and acceptance, to the sum of $4,500, (the same being five years' full pay proper of a colonel of infantry at the close of the Revolutionary War,) with interest at the rate of six per cent. per annum from the date of the disbandment of the army in 1783; that several memorials have, at various times, been presented by the heirs-at-law and legal representatives of the said Colonel Taylor, praying the passage of an act requiring the proper accounting officer of the Treasury of the United States to liquidate and pay to the heirs-at-law of the said Col. Francis Taylor the commutation of five years' full pay, with interest thereon, agreeably to the resolve of Congress of March 22d, 1783; that said memorials, with accompanying papers, were re-
4 peatedly referred to the Committee on Revolutionary Claims of the House of Representatives; that said Committee repeatedly reported favorably on said memorials and recommended the passage of a bill for relief as prayed; that on one occasion, to wit: during the session of the —— Congress, such a

bill passed the House, but failed in the Senate for want of time, owing to the fact that it reached that body near the close of the session; that afterwards, to wit, on the 22d day of January, 1859, said memorials and accompanying papers were referred, by order of the House of Representatives, to this court; that this claim was heretofore prosecuted in the name of the heirs of Colonel Francis Taylor, who claimed as follows:

Five years' full pay of Col. F. Taylor as Colonel of Infantry in the Revolutionary Army . .	$4,500.00
Interest at 6 per cent. per annum from September 3d, 1783, the date of a final treaty of peace between the United States and Great Britain to date, as per resolution of Congress of June 3, 1784 - .	22,680.00
Total . . .	27,180.00

The foregoing statement in this petition is copied substantially from the petitions heretofore filed in this cause, but your petitioner respectfully represents that he is informed and believes that the petitions heretofore filed have not correctly set forth the computation, and that he is entitled to receive the half-pay promised for life under the provisions of the act of October 21, 1780, with interest upon each year's half-pay from the time it became due up to the date of the death of Colonel Francis Taylor, who died on or about the 16th day of June, 1798, leaving a will, which was duly admitted to probate, a copy of which is on file herewith, and that the amount due and unpaid at said date was the sum of $11,322, according to the half pay establishment, which said amount was a debt due the estate of the said Francis Taylor, and on which interest is due at the rate of six per cent. per annum to the present time, in accordance with act of Congress June 3, 1784. (Journal of Congress, Vol. IV, p. 178.)

That the amount justly due your petitioner April 16, 1878, is $65,555.38 principal and interest; and your petitioner
5 prays the judgment of this Honorable Court that he may be allowed to amend the petition in this behalf so as to correct the amount heretofore claimed, and that his claim may be properly stated, if he may be allowed to do so at this stage of the proceedings, without changing the subject-matter of the claim; that is, that he may be allowed the half-pay for life promised by the act of Oct. 21, 1780, instead of the five years' commutation promised in lieu thereof by the act of Mar. 22, 1783, (*Id.*, Vol. IX, pp. 178, 179;) but should the court be of the opinion that your petitioner cannot make this change in the petition

without changing the cause of action, then, in that case, the petitioner prays judgment for five years' pay with interest, in accordance with the act last above mentioned.

P. E. DYE,
Attorney for John G. Williams.

Subscribed and sworn to before me, this 18th day of April, A. D. 1878.

[SEAL.]

JOHN RANDOLPH,
Ass't Cl'k Ct of Claims.

III. *Traverse.* Filed May 6, 1878.

And now comes the Attorney General on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in 6 pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Ass't Att'y General.

IV. *Special Plea.* Filed by defendants May 6, 1878.

And the said defendant, for a further and separate answer to claimant's petition and complaint herein, avers that the said Francis P. Taylor was, in his lifetime, barred of all such relief as is now prayed for in this action and at the hands of this court by laches of his own, in force of and by reason of the resolutions of November 2, 1785, and of July 23, 1787, of the Continental Congress, and in force of and by reason of the further bar of the acts of Congress of 27th of March, 1792, (1 Stat. at L., 245,) and 12th of February, 1793, (1 Stat. at L., 301,) and that said claimants are precluded in like manner and with like effect.

And said defendant, therefore, prays judgment in its favor, and that the petition herein be dismissed.

THOMAS SIMONS,
Ass't Att'y General.

7 V. *Special Plea.* Filed May 6, 1878.

And the said defendant, for a further and separate answer to claimant's petition and complaint herein, avers that the said

Francis P. Taylor, through whom his alleged heirs claim and prosecute this suit by and through the said John G. Williams, administrator of the estate of the said Taylor, deceased, was in his lifetime barred of all such relief as is now prayed for in this action at the hands of this court, by laches of his own, in force of and by reason of the resolutions of November 2, 1785, and of July 23, 1787, of the Continental Congress, and in force of and by reason of the further bar of the acts of Congress of 27th March, 1792, (1 Stat. at L., 245,) and 12th February, 1793, (1 Stat. at L., 301,) and that said claimant and those whom he represents, are precluded in like manner and with like effect.

And the said defendant, therefore, prays that no judgment herein be rendered in favor of claimant, but that his petition herein be, in all things, denied and dismissed.

THOMAS SIMONS,
Ass't Att'y General.

8 VI. *Replication.* Filed by claimant May 20, 1878.

And now comes the said John G. Williams, and by his attorney, P. E. Dye, says that, by reason of anything in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the said United States, because, he says, the said United States, by contract, (resolution of October 21, 1780,) promised to pay the decedent, by and through whom he, the said John G. Williams, now seeks to recover, in the way and and manner and as in that behalf therein set forth in his said petition, and that the said United States have refused, on demand being made, to pay, and still refuse to pay, the claimant's demand, and that all and every part of said claim is still due and unpaid.

And in further replication to defendant's plea, the claimant says that the decedent, Francis Taylor, by and through whom he claims, was always loyal to the Government of the United States and devoted to the cause thereof, and, as to the question 9 of the loyalty of the administrator *de bonis non*, it is not an element in the cause; yet, nevertheless, the claimant affirms his own loyalty to the United States.

And in further replication to defendant's special plea, the said plaintiff avers that the said Francis Taylor, the decedent by and through whom he seeks to prosecute this his cause of action, was not barred in his lifetime from the relief now prayed at the hands of this honorable court by laches of his own, or in virtue or by reason of any statute applicable to this cause then, subsequently, or now in force, or by reason of lack of diligence in the presentation or prosecution of his said claim; and, further, that if the said Francis Taylor were barred in his lifetime or his remedy suspended by reason of any statute then or subsequently in force, the said bar or suspension of remedy was removed by reason of the proviso in the law approved March 3, 1863, organizing this honorable court, and that, for the purposes of this action, the claim accrued within six years, the claim having been filed within the three years after the approval of the act last above.

10 The plaintiff, therefore, prays judgment for the amount claimed and set forth in his said petition, with the cost of this suit.

JOHN G. WILLIAMS,
Adm'r, &c.
P. E. DYE,
Att'y of Record.

VII. *Judgment of the Court.* Entered June 7, 1880.

JOHN G. WILLIAMS, administrator *de bonis non* of Francis Taylor,
vs.
THE UNITED STATES.
No. 2186.

At a Court of Claims held in the city of Washington on the 7th day of June, A. D. 1880, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, the said John G. Williams, administrator *de bonis non* of Francis Taylor, be dismissed.

11 VIII. *Minute by the Clerk.*

The court filed findings of fact and conclusions of law, and an opinion, on the 7th day of June, A. D. 1880.

On the 7th day of September, 1880, the claimant's counsel filed a motion for a new trial, which the court overruled March 14, 1887, and made the following order as to the findings of fact, to wit:

Ordered, That the findings of fact as amended stand as the findings of the court, and that the motion for a new trial be overruled.

On the 16th day of May, 1887, the court ordered that the judgment entered June 7, 1880, be vacated, and that judgment dismissing the petition be entered *nunc pro tunc* as of March 14, 1887.

12 IX. *Amended findings of fact and conclusions of law filed by the court in the stead of the original findings and conclusions.* March 14, 1887.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

Francis Taylor was commissioned captain in the Second State Regiment of the Virginia forces on Continental establishment May 8, 1776; he continued in active service and was promoted and commissioned major in said regiment with rank from July 12, 1778, and he became supernumerary major by the arrangement of the Continental army at White Plains in September, 1778.

II.

The regiment, commonly designated as the Albemarle Guards, was originally authorized by the resolution 19th December, 1778, of the House of Delegates of the State of Virginia, but was taken up on Continental establishment under and by virtue of the resolution 9th January, 1779, (3 Jour. Cong., p. 179.) From the 9th January to the 5th March, 1779, Francis Taylor was in command of the regiment as lieutenant colonel. On March 5, 1779, he was commissioned as colonel by the Governor of Virginia, and as such commanded said battalion up to the 15th day of June, 1781, when the battalion was disbanded by the discharge of such men as were enlisted to serve only during the continuance of the convention prisoners in the State of Virginia.

III.

There is no evidence showing that Col. Francis Taylor ever resigned his commission in the Continental service, or that he was ever otherwise than ready and willing to render service in the same, or higher grade, when required so to do.

IV.

The acceptance of the Virginia line and officers of the commutation offered under the resolution of Congress of March 22, 1783, was made and duly reported as required by the resolution.

V.

Col. Francis Taylor died on or about the 16th day of November,. 1799.

VI.

Col. Francis Taylor was not paid the half pay for life under the resolution of Congress of October 21, 1780, and no commutation certificate was issued to him or his heirs in lieu thereof.

VII.

13 Col. Francis Taylor, during his lifetime, and his heirs and legal representatives since, have made frequent and

continuous application to the Government and to Congress for the payment of this claim up to the time of bringing this suit; and on the 22d day of January, 1859, a memorial to Congress praying its payment was referred by the House of Representatives to this court for adjudication.

Which resolution is in the words following:

Ordered, That the petitions and papers in the cases of Dr. Charles Taylor, Col. Francis Taylor, and James Broadus be withdrawn from the files of the House and referred to the Court of Claims. (House Journal, 1858–'59, p. 241.)

VIII.

It appears, and the court finds the fact to be, that on the 5th March, 1779, Lieutenant Colonel Taylor, then commanding the regiment known as the Albemarle Guards, was commissioned as colonel by the Governor of Virginia, and that he continued to command the regiment with the rank of colonel until it was disbanded. It further appears that the regiment continued in the Continental service after the expiration of the year's service designated in the resolution of 9th January, 1779, (3 Jour. Cong., p. 179,) and until the 15th June, 1781, when the regiment was disbanded. It further appears that on the 13th February, 1781, while the Baron Steuben was acting as inspector general of the Continental forces, and was charged with the duty of consolidating and reducing the regiments of the line furnished by Virginia, under the resolutions of 3d and 21st October, 1780, (3 Jour. Cong., pp. 532, 538,) Mr. Jefferson, then Governor of Virginia, addressed the following official communication to Colonel Taylor:

"RICHMOND, *Feb.* 13, 1781.

"SIR: * * * Congress having determined newly to model their forces, the Baron Steuben is now here on that business.

"The Assembly have directed the Executive to have the same done as to the State troops.

"Your regiment, being in Continental service, will be submitted to Baron Steuben. Till this be done, which, however, will be done in a few days, no promotions can take place." * * *

And on the 14th March, 1781, Mr. Jefferson, as Governor of Virginia, likewise addressed the following official communication to Colonel Taylor:

"IN COUNCIL, *March* 14, 1781.

"Col. F. TAYLOR:

"SIR: Before this comes to hand, Col. Wood will have received orders to carry the conventioners to Knowland's Ferry, thence to be guarded by the State of Maryland.

"At that place, therefore, you will please to discharge such of your regiment as were enlisted to serve only during the continuance of the conventioners in Albemarle or in this State." * * *

It also appears that Mr. Jefferson, while Governor of Virginia, on the 28th November, 1779, addressed the following communication to the commander-in-chief:

"WILLIAMSBURG, *November* 28, 1779.

"To his Excellency General WASHINGTON:

"SIR: Your Excellency's letter on the discriminations which have been heretofore made between the troops raised within this State and considered as part of our quota, and those not so considered, was delivered me four days ago. I immediately laid it before the Assembly, who thereupon came to the resolution I now send you.

"The resolution of Congress of March 15, 1779, which
14 you were so kind as to inclose, was never known in this
State till a few weeks ago, when we received printed copies
of the Journal of Congress.

"It would be a great satisfaction to us to receive an exact return of all the men we have in Continental service who come within the description of the resolution, together with our State troops in Continental service. Colonel Cabell was so kind as to send me a return of the Continental regiments commanded by Lord Sterling, of the First and Second Virginia State Regiments, and of Colonel Gist's regiment.

"Besides these are the following, viz: Colonel Harrison's regiment of artillery, Colonel Baylor's horse, Colonel Bland's horse, General Scott's new levies, part of which are gone to Carolina and a part are here. Colonel Gibson's regiment, stationed on the Ohio, Heath and O'Hare's independent companies at the Stomel station, Colonel Taylor's regiment of guards to the convention troops; of these we have a return.

"There may possibly be others not occuring to me.

"A return of all these would enable us to see what proportion of the Continental Army is contributed by us." * * *

It further appears that no official records are known to exist which set forth the grounds upon which Colonel Taylor was commissioned as colonel of the Albemarle Guards on the 5th March, 1779; nor any official record which would explain the reason why the said regiment continued in service beyond the year for which it was enlisted under the resolution of 9th January, 1779; nor any official record which would show whether the said regiment or a portion of it did or did not re-enlist for the war under the resolution of January 23d, 1779 (3 Jour. Cong., p. 190;) nor any official record which would show whether a portion of the said regiment continued in service after the regiment was disbanded on the 15th June, 1781; nor any official record which would show that Colonel Taylor was discharged from the service when his regiment was disbanded.

But it appears from an ancient writing found in the public archives of the State of Virginia, purporting to be the proceedings of "A board of field officers, begun at Chesterfield, February 10, 1781, by order of Major General Baron Steuben, for the purpose of arranging the Virginia line," that the regiments reduced in the State of Virginia under the resolutions 3d and 21st October, 1780, (3 Jour. Cong., pp. 532–'8,) were the eleven regiments of the Virginia line and one regiment of artillery, the former during the month of February being reduced to eight regiments; and that the only colonels mentioned in the said proceedings as reduced were Colonels William Heath and Abraham Buford, two of the twelve regiments being at the time without colonels. It does not appear that any other reduction of Virginia troops took place under the resolutions 3d and 21st October than that at Chesterfield; nor does it appear that the regiment known as the Albemarle Guards was reduced by the Baron Steuben or by any other official authority under the resolutions aforesaid. The ancient writing referred to is among the official papers of the first auditor's office of the State of Virginia; it is not signed or authenticated by any person, but was placed among the official records not long subsequent to the proceedings of the board, and has always been treated by the officers having it in charge as an authentic record of the proceedings of the board.

IX.

No certificate of indebtedness as prescribed by the resolution March 22, 1783 (4 Jour. Cong., p. 178,) was ever issued to Colonel Taylor by the superintendent of finance for the commutation of five years' full pay instead of the half-pay for life given to officers of the Continental Army by the previous resolution, October 21, 1780; nor by the Paymaster General, as prescribed by the resolution 4th July, 1783 (4 Jour. Cong., p. 237.)

15 On the 30th July, 1783, the State of Virginia, by the auditor of public accounts, pursuant to an act of Assembly, passed at the November session, 1781, (10 Henning Stats., 462,) settled the account of Colonel Taylor for the balance of his full pay, commonly known as "depreciation pay," and issued to him evidence of indebtedness for £679 19*s.* 2*d.*, this being for his services as lieutenant colonel from the 24th December, 1778, to the 5th March, 1779; and for his services as colonel from the 5th March, 1779, to the 15th June, 1781. And at various times sub-

sequent to the 27th November, 1783, the State of Virginia, by the proper officers, issued to Colonel Taylor land warrants for eight years' of service as an officer in the Continental Army.

The foregoing payment of the State of Virginia of £679 19*s*. 2*d*. was one of the payments of that State to Continental officers subsequently assumed and refunded to the State by the United States. On the 4th February, 1850, the Commissioner of Pensions issued to the administrator of Colonel Taylor's estate a land warrant for services as colonel in the Continental Army.

X.

The five years' full pay authorized by the resolution 22d March, 1783 (4 Jour. Cong., p. 178,) amounted, for a colonel of infantry, to the sum of $4,500.

XI.

On the 19th day of March, 1834, John H. Smith, commissioner, reported to the Governor of the Commonwealth of Virginia, in the case of the heirs of Francis Taylor, in the following words:

"*Heirs of Francis Taylor, Colonel Continental.*

"Colonel Taylor has received land for a service of eight years as major.

"He was colonel in the Continental service and ought to have been allowed land in that character.

"There is no proof of his being entitled to land for a longer time than eight years.

"His heirs are entitled to the difference between the bounty to a colonel and that to major for a service of eight years.

16 "This claim has been reported in List No. 2, which has been printed by order of the House of Delegates.

"Respectfully submitted,

"JOHN H. SMITH,
Com'r, &c.

"*March 19th*, 1834.

"To His Excellency Governor FLOYD."

The name of Francis Taylor was reported with the rank of colonel in the Continental Line for a service of eight years by John H. Smith, commissioner, in List No. 2, "of officers of the Virginia Continental and State Lines," &c., "whose names appear on the Army Register," and that said List No. 2 was reported by the Governor in his message to the House of Delegates of the Commonwealth of Virginia, and was by them ordered printed in 1834 as Executive Doc. No. 31.

Subsequently the Governor of the Commonwealth of Virginia rendered his decision on the report of the commissioner in the case of the heirs of Francis Taylor in the following words:

"To the heirs of Francis Taylor, for his services as colonel in the Continental Line from October 1, 1775, to the close of the war:

17 "Ordered, That the register issue warrants accordingly, if not already drawn."

And upon the foregoing findings of fact the court decides as conclusions of law—

1. The foregoing circumstantial facts set forth in finding VIII, taken in connection with the contemporary resolutions of the Continental Congress and the historical events of the war occurring during the same period, are not sufficient evidence to authorize or sustain a finding of the ultimate fact that a portion of the soldiers of Colonel Taylor's regiment of Guards re-enlisted for the war and became soldiers in the Continental service without the limitations attached to their original enlistment under the resolution 9th January, 1779.

2. The facts set forth in all of the findings are not sufficient to authorize or sustain a finding of the ultimate fact that Colonel Taylor's regiment of Guards was reduced on the 15th June, 1781, under and in pursuance of the resolutions 3d and 21st October, 1780. (3 Jour. Cong., p. 532–8.)

3. The claimant, upon the foregoing findings, is not entitled to judgment under and by virtue of the provisions of the act 5th July, 1832. (4 Stat. L., p. 563.)

18 4. The report of the commissioner of the State of Virginia set forth in finding XI, though approved and adopted by the Governor of that State, is neither obligatory in law nor conclusive as evidence against the United States.

X. *Opinion of the Court.*

Nott, J., delivered the opinion of the court:

The court has listened to the two arguments of the counsel for the claimant with the respect which their learning, ability, and earnestness demanded, and has approached the consideration of this case with the favorable inclination that a revolutionary claim always receives in this country; but has regretfully reached the conclusion that the moral probabilities on which it rests do not constitute such a foundation of circumstantial evidence as would sustain a verdict in a suit at *nisi prius* or authorize a judgment in this court. A brief analysis of the case will, we think, render this apparent.

But, at the outset of this inquiry, it is to be noted that there are certain terms in the legislation of the Continental Congress and in the military dispatches and orders of the time, 19 of which the significance should be ascertained.

In the recent war the official process by which officers, soldiers, and regiments of volunteers were discharged from the service of the United States was termed their "muster out." The certificate given to a soldier evidencing this fact was termed his "discharge." The combination of different regiments or fragments of regiments into new regimental organizations was called their "consolidation," and the officers thrown out by consolidation were spoken of generally as "officers unattached," *i. e.*, as officers holding commissions and still in the service, but as not attached to any command. (Hildeburn's Case, 13 C. Cls. R., 62.)

During the period of the Revolution the term muster-out was not used, and troops, either individually or as organizations, are spoken of as "discharged" when dismissed from the Continental service. A regiment broken up and consolidated is spoken of as "reduced," and officers who were thereby thrown out and became unattached were designated as "supernumeraries." The consolidated regiments, moreover, are variously designated as "the new arrangement," the "new establishment," the "newly constructed corps," &c. As to the term "disbanded," it seems to have had no technical significance. When a regiment was disbanded some of its soldiers may have been discharged and some transferred to other regiments, the term denoting simply the dissolution of the regiment.

The undisputed facts of the case are these:

In December, 1778, Maj. Francis Taylor was one of the supernumerary officers who had been thrown out by that consolidation of regiments in 1778, which is best known as the White Plains arrangement. As such supernumerary he was liable to be called into service on the one hand and entitled to half pay for life on the other. At that time the captured army of General Burgoyne, popularly and officially designated as the "convention prisoners," had been conducted to Albemarle by troops of the Virginia line; that is to say, by a portion of the regular army able and liable to do active field service. But the task of guarding them had been assigned to the State of Virginia. At that time, as in all wars, it was found that there were many persons willing to enlist for guard or provost marshal duty who were unwilling to encounter the privations, hardships, and dangers of active service in the field. Accordingly it was suggested by Mr. Jefferson that a regiment be raised for the express purpose of guarding the convention prisoners.

On the 19th December, 1778, the House of Delegates passed the following resolution authorizing and directing the raising of such a regiment:

"Whereas it will be exceedingly burthensome and inconvenient to the inhabitants of this Commonwealth to keep so large a body of militia on constant duty as will be necessary to guard the British prisoners which now are or hereafter may be stationed in this Commonwealth:

"*Resolved*, That the Governor, with the advice of the council, shall be, and he is hereby, empowered to raise, as soon as possible, by voluntary enlistment, a regiment of soldiers, to consist of six hundred men, rank and file, with proper officers to command them, for the particular purpose of guarding the British prisoners aforesaid; and that he is empowered to offer a bounty, not exceeding thirty dollars, to each man so to be enlisted; and this House will make good the expense of raising, maintaining, clothing, and paying the said regiment; and until such regiment be raised, the Governor is hereby empowered, with the advice of the council, to call out detachments of militia for the purpose of guarding the said prisoners. (Jour. House Delegates, p. 127.")

And on the 9th January following (1779) the Continental Congress, probably in pursuance of some private understanding with the authorities in Virginia, passed the following resolution:

20 "SATURDAY, *January* 9, 1779."

* * * * * * *

"A letter of the 6th, from the Board of War, was read; whereupon

"*Resolved*, That a battalion, consisting of 600 men, properly officered, be forthwith raised on Continental establishment in Virginia, for the space of one year from the time of their enlistment, unless sooner discharged, under the direction of the Governor and council of that State, *who are hereby empowered to appoint the officers of the said battalion out of those of the Virginia line who have been left out of the late arrangement of the Continental Army, as far as their numbers will reach.*

"The regiment to consist of one lieutenant colonel, commandant and captain, one major and captain, six captains, one captain lieutenant, seven lieutenants, nine ensigns, one surgeon, one surgeon's mate, eight companies of 75 men each, including corporals, three sergeants, one drum and one fife to each company.

"That these troops be stationed at, and not removed (except to such distances as the duty of the post may require) from, the barracks in Albemarle county, as guards over the convention troops; that they receive the usual pay of the Continental Army, and a suit of clothes as a bounty to each non-commissioned officer and private.

"That as soon as the said *regiment shall be* so far complete as to be able to do the duty of the post *the militia now in the service there be discharged.* (3 Jour. Cong., p. 179.")

Under these resolutions such a regiment was raised and Maj. Francis Taylor was assigned to the command of it, with the rank of lieutenant colonel. Thereafter it was known as the Albemarle Guards, and is occasionally spoken of simply as the "Guards."

On the 5th March, 1779, Lieutenant Colonel Taylor was commissioned as colonel of the regiment by the Governor of Virginia. Under what authority or upon what theory this was done nowhere appears in official or historic records. We know from the Journals of Congress that there was no express or specific authority given for thus transcending the limit of rank expressly set by the resolution 9th January, 1779; but the fact that he was thus commissioned is unquestioned and forms a significant element in the claimant's theory of the case.

On the 9th January, 1780, the regiment was still in service, guarding the convention prisoners, and continued so to serve for nearly three times the period of their original enlistment. Whether the men re-enlisted is unknown and by what authority the regiment thus continued upon Continental establishment cannot be ascertained. The Journals of Congress are again silent and no order or correspondence which would throw light upon the subject appears to exist; but it is unquestionable that the same regiment so commanded by Colonel Taylor continued thus in service until, under an order issued by the Governor of Virginia, the convention's prisoners being removed into Maryland, the regiment was disbanded on 15th June, 1781. This order of Governor Jefferson was as follows:

"IN COUNCIL, *March* 14, 1781.

"Col. F. TAYLOR.

"SIR: Before this comes to hand Colonel Wood will have received orders to carry the conventioners to Knowland's Ferry, thence to be guarded by the State of Maryland.

"At that place, therefore, you will please to discharge such of your regiment as were enlisted to serve only during the continuance of the conventioners in Albemarle or in this State."

* * * * * * *

In order to understand the significance of these facts and their relations to the present case it is now necessary to advert to the law upon which the claim of Colonel Taylor and his descendants rests.

The Continental Congress, by the *resolutions 3d October* and 21*st October*, 1780, (3 Jour. Cong., pp. 532, 538,) determined to reorganize the Army in a manner which would involve the consolidation or reduction of regiments. The Army, which was to be reduced as designated by the resolutions, then consisted of sixteen "additional regiments," some or all of which had not been "annexed to the line" of any "particular State," of certain specifically-named irregular battalions and light corps, and of eighty battalions, known as the Continental line. As to the "sixteen additional battalions" and the irregular battalions specifically named the resolutions directed that they "be reduced," and the non-commissioned officers and privates "be incorporated with the troops of their respective States." This provision related to troops which had been raised directly by Congress, and its purpose was threefold: to sweep them out of existence as organizations, to transfer the men to the regular regiments of the Continental line, and to credit them to the quotas of their respective States.

The resolutions next provided for the further reorganization of the Army at large—of the Continental line. So far as this case is concerned, it is sufficient to say that they provided, in effect, that the eleven regiments in the line furnished by Virginia should be reduced to eight, and that no mention of the Albemarle Guards is made in the resolutions.

Having thus provided for the transfer of men and reduction of regiments, the resolutions further declared with regard to the officers who would necessarily be thrown out by the reduction:

"And whereas, by the foregoing arrangement, many deserving officers must become supernumeraries, and it is proper that regard be had to them:

"*Resolved*, That from the time the reform of the Army takes place they be entitled to half-pay for seven years, in specie or other current money equivalent, and also grants of land at the close of the war, agreeably to the resolution of the 16th of September, 1776.

"*Ordered*, That a copy of the foregoing arrangement of the Army be sent to the commander-in-chief for his opinion thereon, and that, if there shall appear no material objections, the same be carried into immediate effect. (Resolution October 3, 1780.)

"Congress resumed the consideration of the report of the committee on General Washington's letter of the 11th; and thereupon" * * *

"*Resolved*, That the whole of the troops be enlisted during the war and join their respective corps by the 1st day of January next.

That the commander-in-chief and commanding officer in the Southern Department direct the officers of each State to meet and agree upon the officers for the regiments to be raised by their respective States from those who incline to continue in the service, and where it cannot be done by agreement, to be determined by seniority, and make return of those who are to remain, which is to be transmitted to Congress, together with the names of the officers reduced who are to be allowed half-pay for life. (Resolution Oct. 21, 1780.")

It is manifest that Colonel Taylor's regiment, or the Albemarle Guards, were not designated by the resolutions in direct terms, nor do they seem to have been embraced in any general classification. The regiment had been raised for the space of one year from the time of enlistment, unless sooner discharged. It was to be "stationed at, and not removed (except to such distance as the duty of the post may require) from, the barracks in Albemarle," and its sole military service was that it should act "as guards over the convention troops." If it continued upon this basis until discharged it is clear that its officers did not become supernumeraries under the arrangement for reorganizing the Continental Army of October 3 and 21, 1780 (3 Jour. Cong., pp. 532, 538;) for, in the first place, the regiment would have passed out of existence before that time arrived, and, in the second place, it had, as originally constituted, no material to be consolidated; that is to say, no enlisted soldiers who could be transferred to the regiments of the line. Its soldiers had been enlisted not only for a limited period, but also for a limited designated service, and that service was to be rendered within exceedingly narrow territorial limits. The question, therefore, is whether the Albemarle Guards, or a portion of them, had re-enlisted for the war under the contemporaneous
resolution 23d January, 1779 (3 Jour. Cong., 190,) and be-
22 came reduced or consolidated with other regiments under
the resolutions of October, 1780.

The learned counsel for the claimant contends with great earnestness that the evidence produced and the history of the period combine to sustain the conclusion that they did re-enlist, and this for the following reasons:

In the first place, it is argued, before the regiment could have been fairly organized the Continental Congress, on the 23d of January, 1779, resolved "that the commander in-chief be authorized and directed to take the most effectual measures to re-enlist; for the continuance of the war, all such of the Continental troops as are not expressly engaged for that period." And the resolution, moreover, declared and promised new bounties and rewards "to each able-bodied soldier now in the service and who shall voluntarily re-enlist during the war."

On the 9th March, 1779, Congress amended the resolution and recommended that the States raise troops by draft. (3 Jour. Cong., 223.) In May of the same year came the Virginia re-enlistment act, (10 Henning's Stat., p. 25,) and on the 16th August following Congress recommended to the several States to make further provision for the soldiers "enlisted for the war," and on the 15th December, 1779, shortly before the time when the year of the original enlistment of the Albemarle Guards would expire, Congress further resolved, "That such of the Virginia troops whose times of service will expire by the last day of March next, and who incline to enlist for the usual bounties to serve during the war, be permitted to go home on furlough till the first day of April next." (3 Jour. Cong., p. 412.) It, therefore, happened that, through this prescribed year of the Albemarle Guards' original enlistment, the strongest and most strenuous efforts were made to procure re-enlistments for the war that the history of the Revolution discloses. It would be contrary to reason and experience, it is said, to suppose that the combined efforts of the Continental Congress, the commander-in-chief, and the State of Virginia produced no effect whatever on this one Virginia regiment.

In the second place, the resolution 9th January, 1779, authorizing the Albemarle Guards, provided that the battalion should be commanded by a lieutenant colonel. On the 5th March following the commanding officer was commissioned as colonel. If the regiment had continued upon its original basis it would have required fresh legislation to authorize the promotion. We know from the Journals of the Continental Congress that no such legislation took place. Between the 9th January and the 5th March, on the contrary, came the resolution of 23d January, 1779, (3 Jour. Cong., p. 190,) showing no favor to short enlistments, and making the most strenuous effort to procure re-enlistments for the war. When that resolution was passed Colonel Taylor's men had a year of service before them: the resolution promised them liberal, if not exorbitant, bounties to change this enlistment into an enlistment for the war: and the only known explanation of his becoming a colonel on the 5th March, contrary to the terms of the resolution under which he came into the service, is the natural probability that a considerable number of his newly-enlisted men accepted those bounties and yielded to the solicitations of their officers by re-enlisting, thereby becoming ultimately a part of the Continental line.

In the third place, the resolution 9th January prescribed a period of service not exceeding one year for the regiment. To extend this period of service, if the regiment continued to stand on its original enlistment, would require new legislation. No such legislative authority was given. We also know by the
23 history of the war that when a regiment's time had expired the men were generally clamorous to return to their homes. Yet this regiment continued in service, without legislative authority on the one side and without applications for discharge on the other, from the 9th January, 1779, to the 15th June, 1781; that is to say, for a period more than double that of its original enlistment. The only explanation of this unprecedented fact, the learned counsel contends, is that the men had re-enlisted for the war.

In the fourth place, after the original year had elapsed Congress, in the resolution 9th February, 1780, (3 Jour. Cong., 432.) recognized the Guards as a part of the Virginia quota of the Continental line, and classified them among men "whose times of service do not expire before the last date of September next." When we remember the close scrutiny which the Continental Congress gave to all matters connected with the Army of the Revolution, and the intimate knowledge of details which the Journals constantly display, we must regard this recognition of the Guards, it is argued, as almost conclusive evidence of their having been a re-enlistment.

In the fifth place, more than two years after the original enlistment of the regiment and more than a year after the original term of service had expired, Colonel Taylor apparently had applied to the Governor of Virginia to promote some of his officers. At that time the reorganization of the Continental Army under the resolutions of October, 1780, was going on, and the inspector general, the Baron Steuben, had been sent to Virginia, charged with the duty of consolidating the regiments of that State. Accordingly Mr. Jefferson, then Governor of Virginia, replied to Colonel Taylor:

"RICHMOND, *Feb.* 13, 1781.

"Col. F. TAYLOR.

"SIR: * * * Congress having determined newly to model their forces, the Baron Steuben is now here on that business.

"The Assembly have directed the Executive to have the same done as to the State troops.

"Your regiment, being in Continental service, will be submitted to Baron Steuben; till this be done, which, however, will be done in a few days, no promotions can take place." * * *

In the sixth place, the last order known to have been given to Colonel Taylor is that of Governor Jefferson, 14th March, 1781, directing him to carry the convention prisoners to Knowland's Ferry and turn them over to Colonel Wood. Mr. Jefferson does not then notify him that he, his officers and regiment, will be discharged from service, the duty for which they enlisted having expired; but, on the contrary, he directs him "to discharge *such of your regiment* as were enlisted to serve only during the continuance of the conventioners in Albemarle or in this State." The order, the learned counsel contends, is so directly opposed to the entire dissolution of this regiment in conformity with the provisions of the original resolution 9th January, 1779, that it can only be reconciled with that resolution by the supposition that the greater part of the men had re-enlisted for the war.

Finally, and in harmony with and corroboration of the foregoing circumstances, Colonel Taylor, immediately after the war, while the facts were fresh in the minds of men and the documentary evidence to substantiate them was still extant, was paid his depreciation pay for the period that he served as colonel of the Albemarle Guards, although the resolution 10th April, 1780, authorizing such pay, expressly provided that "no person shall have any benefit of this resolution except such as were engaged to serve during the war or for three years."

21 Notwithstanding the ability and plausibility of this argument, we are constrained to say that the circumstances and coincidences so much relied upon, though they might appeal strongly as establishing a moral probability to a body possessed of legislative discretion, do not rise to the standard of legal evidence and are insufficient to authorize a judgment or sustain a verdict. No authenticated document nor official record has been produced to show that a single soldier of Colonel Taylor's regiment had re-enlisted for the war, or was liable to serve beyond the limits of the State of Virginia, or could have been transferred to regiments of the line under the resolutions. No such averment was made by Colonel Taylor himself in his petitions to Congress and the House of Delegates, nor is it alluded to in any contemporary report, letter, or communication. Neither the House of Delegates, in 1783, nor the Secretary of War, General Knox, in 1791, regarded the Albemarle Guards as one of the regiments which had been reduced and consolidated under the resolutions of 1780; and the silence of the resolutions themselves, with all their particularity as to other commands, indicates that the Continental Congress were not aware of there being soldiers in the Guards who were liable to be transferred to the line.

Moreover, the time when the regiment was disbanded, June 15, 1781, was subsequent to the consolidation of the Virginia regiments by the Baron Steuben, (February,) and the apparent cause of disbandment was not its consolidation with other regiments, but the termination of the service or duty for which it had been raised and on which it had been exclusively engaged. The mention of the Guards in the resolutions 9th February, 1780, (3 Jour. Cong., 432,) and in the correspondence of Mr. Jefferson with General Washington, on which great stress was laid in the argument, was applicable to the regiment, whether its soldiers had re-enlisted or not; for it was proper and just that its soldiers, who were continuing in service beyond the period of their enlistment, and who, in all seeming likelihood, were to continue in the service of guarding the prisoners till the end of the war, should be credited to the quota of Virginia. The language of the resolution is as follows:

"*Resolved*, That for the ensuing campaign the States be respectively required to furnish, by draughts or otherwise, on or before the first day of April next, their respective deficiencies of the number of 35,211 men, exclusive of commissioned officers, which Congress deem necessary for the service of the present year.

"That the quotas of the several States be as follows:

New Hampshire	1,215	Delaware	405
Massachusetts Bay	6,070	Maryland	3,238
Rhode Island	810	Virginia	6,070
Connecticut	3,238	North Carolina	3,640
New York	1,620	South Carolina	2,430
New Jersey	1,620		[exclusive of blacks.]
Pennsylvania	4,855		

"That all the men *whose times of service do not expire before the last date of September next* be counted towards the quotas of the States to which they respectively belong, whether they compose the battalions in the line of the several States, those of the additional corps, *including the Guards*, the artillery and horse, or the regimented artificers in the departments of the quartermaster general and commissary general of military stores, who, being credited to the States respectively, should be provided for, deemed and treated in the same manner with the men in the several State lines; and it is recommended to the several States to make like provision for the officers and men of the artillery, horse, additional corps, *including the Guards* and regimental artificers, as may be made in pursuance of any resolution of Congress, for the officers and men of their respective battalions, with such exceptions, respecting the regimented artificers, as have been made by Congress in their acts concerning them. (Resolution 9th February, 1780, 3 Jour. Cong., p. 432.")

The first purpose of the resolution was manifestly to fix
25 and determine the number of men which each State should
contribute. The second likewise related to State quotas, being a declaration that all of the men whose terms of service would not expire before the last of September following should be credited to their respective States. accompanied by a pledge that the men (not the officers and men) of certain irregular organizations, "including the Guards," "should be provided for, deemed, and treated in the same manner" as the men in the line. The third provision was a recommendation to the States "to make like provision for the officers and men" of the designated irregular corps, "including the Guards," as might be made "for the officers and men of their respective battalions." In the first provision the Guards were referred to as a corps which had, or which might have had, men who should be credited on the quota of Virginia; in the third the officers and men of the Guards are designated as among those for whom the States should make the same provision which they would make "in pursuance of any resolution of Congress" for the officers and men of their respective battalions.

It is true that the language of the resolution does seem to indicate that then, on the 9th February, 1789, there were men in the Guards "whose times of service do not expire before the last date of September next." But it is also true that the words, "including the Guards," in the first provision, may have been intended merely as a comprehensive, sweeping clause, equivalent to saying that all men whose times of service did not expire, in whatever corps they might be found, should be counted upon the quota of Virginia; and that the same words in the third provision were intended as new legislation, as a special provision to classify the Guards, who were continuing to serve beyond their times of enlistment with men whose enlistment would not expire "before the last day of September next."

Be that as it may, we cannot accept the ambiguous phraseology of the resolution as authoritatively fixing the desired fact that the Guards, or a portion of them, had re-enlisted for the war, and were liable to be reduced and consolidated under the resolutions, which followed in October of the same year. It was proper and just that these officers and men should be thus provided for; but it does not follow that such a recognition establishes the fact that they stood on the same basis of enlistment for the war and for service in the field that the troops of the line stood upon.

Finally, the depreciation pay, which, under the resolution 10th April, 1780, was only to be given to persons who "had engaged to serve during the war or for three years," may well have been allowed to Colonel Taylor as a supernumerary officer in actual service by virtue of the terms of his original enlistment. But whatever the theory upon which it was allowed, we cannot infer from it the fact that Colonel Taylor's regiment, in whole or in part, had re-enlisted for the war, and that he had been reduced under the resolutions of October, 1780. Upon the whole of the evidence we must rule that it is insufficient to sustain a verdict, and that we are not at liberty, when sitting in the stead of a jury, to pass upon it or to deduce ultimate facts from it.

It is proper to notice the fact that the claimant also rests his case upon the *Act 5th July*, 1832. (4 Stat. L., 563.) That statute was intended to reimburse the State of Virginia for certain judgments which had been rendered against the State in her own courts by officers for half-pay and to pay directly, without waiting for judgments to be recovered against the State, similar claims covered by the decision of the Virginia courts in *Lilley's Case* (1 Leigh's R., 529, &c.) The first section of that act is limited to officers commanding in the "Virginia line;" the second refers to certain regiments and corps specifically designated by name, and does not specify the Albemarle Guards; the third directs the Secretary of the Treasury "to adjust and settle those claims" of officers "of the aforesaid regiments and corps which have not been paid or prosecuted to judgments against the State of Virginia." We are of the opinion that the benefits of the third section are clearly limited to the regiments and corps enumerated in the second section, and cannot be extended to the officers of other regiments or corps, though they may have a valid claim for half-pay against that State.

The judgment of the court is that the claimant's petition be dismissed.

26 XI. *Order vacating former judgment and directing judgment to be be entered as of March* 14, 1887.

Judgment.

At a Court of Claims held May 16, 1887, the court made the following order in this case, to wit:

Judgment having been entered in this case June 7, 1880, and a motion for a new trial having been made by the claimant at the same term, which motion was pending until March 14, 1887, when the facts were amended and the motion overruled, it is now ordered that the said judgment be vacated and set aside, and a new judgment, of the same tenor, be entered *nunc pro tunc* as of March 14, 1887, dismissing the petition.

In compliance with the above order, judgment as of March 14, 1887, was entered, as follows:

The court, on due consideration of the premises, find for the defendant, and do order, adjudge, and decree that the petition of the claimant, John G. Williams, administrator *de bonis non* of Francis Taylor, be dismissed.

27 XII. *Motion of claimant to amend findings of fact with rulings of the court thereon.* Filed March 14, 1887.

And now comes the claimant, by his attorney, P. E. Dye, and moves the court to amend the XI finding of fact filed by the court herein by prefixing thereto the following:

"On the 11th day of March, 1834, the General Assembly of the Commonwealth of Virginia passed an act in these words:

"*Be it enacted by the General Assembly*, That John H. Smith be, and he is hereby, appointed and constituted a commissioner, whose duty it shall be to continue the examination directed under a resolution of the General Assembly of the 21st day of February, 1833, touching the revolutionary documents of this Commonwealth, and he shall lay before the Governor any information he may discover as to any unsatisfied revolutionary claims of this Commonwealth on the Government of the United States.

"It shall, moreover, be the duty of the said Commissioner to examine all claims for military land bounties, not heretofore de-

cided on, which may arise under any existing law or resolution
28 of the General Assembly, and report the facts relating
to the same, together with any remarks which he may
deem pertinent and proper, to the Governor of this Commonwealth, whose decision thereupon shall be final."

* * * * * * *

So that the XI finding, when amended, may read as follows:

"XI.

"On the 11th day of March, 1834, the General Assembly of the Commonwealth of Virginia passed an act in these words:

"*Be it enacted by the General Assembly*, That John H. Smith be, and he is hereby, appointed and constituted a commissioner, whose duty it shall be to continue the examination directed under a resolution of the General Assembly of the 21st day of February, 1833, touching the revolutionary documents of this Commonwealth, and he shall lay before the Governor any information he may discover as to any unsatisfied revolutionary claims of this Commonwealth on the Government of the United States.

"It shall, moreover, be the duty of the said commissioner to examine all claims for military land bounties, not heretofore decided on, which may arise under any existing law or resolution
29 of the General Assembly, and report the facts relating
to the same, together with any remarks which he may
deem pertinent and proper, to the Governor of this Commonwealth, whose decision thereupon shall be final." * * *

On the 19th day of March, 1834, John H. Smith, commissioner, reported to the Governor of the Commonwealth of Virginia, in the case of the heirs of Francis Taylor, in the following words:

"*Heirs of Francis Taylor, Colonel Continental.*

"Colonel Taylor has received land for a service of eight years as major.

"He was colonel in the Continental service and ought to have been allowed land in that character.

"There is no proof of his being entitled to land for a longer time than eight years.

"His heirs are entitled to the difference between the bounty to a colonel and that to major for a service of eight years.

"This claim has been reported in List No. 2, which has been printed by order of the House of Delegates.

"Respectfully submitted,

"JOHN H. SMITH,
"*Comm'r, &c., March 19th*, 1834.

"To his Excellency Governor FLOYD."

30 The name of Francis Taylor was reported with the rank of colonel in the Continental line for a service of eight years by John H. Smith, commissioner, in List No. 2 "of officers of the Virginia Continental and State lines," &c., "whose names appear on the Army Register," and that said List No. 2 was reported by the Governor in his message to the House of Delegates of the Commonwealth of Virginia, and was by them ordered printed in 1834 as Executive Doc. No. 31.

Subsequently the Governor of the Commonwealth of Virginia rendered his decision on the report of the commissioner, in the case of the heirs of Francis Taylor, in the following words:

"To the heirs of Francis Taylor, for his services as colonel in the Continental line from October 1, 1775, to the close of the war.

"*Ordered*, That the register issue warrants accordinly, if not already drawn."

And upon the foregoing request for amended finding the court makes the following ruling, to wit:

Inasmuch as the Supreme Court takes judicial cognizance of statutes, State as well as National, and the practice of finding State laws would be an inconvenience, this request is refused. 31

The court is also respectfully requested to find the following fact, viz:

XII.

Colonel Francis Taylor was an officer in the Continental service on the 22d day of March, 1783, and continued therein as such officer to the end of the war.

P. E. DYE,
Attorney for Claimant.

And upon the foregoing request for an additional finding the court makes the following ruling, to wit:

Inasmuch as this finding involves a deduction from specific facts and circumstances which, so far as they are established by the evidence, are set forth in the previous findings, and really involves a conclusion of law, it is refused.

32 XIII. *Application of claimant for and allowance of appeal.*

JOHN G. WILLIAMS, administrator *de bonis non* of Francis Taylor,
vs.
THE UNITED STATES. } 2186.

And now comes the claimant, by P. E. Dye, his attorney, and moves the court for the allowance of an appeal from the judgment of the court rendered in this cause on the 14th day of March, 1887, to the Supreme Court of the United States.

JOHN G. WILLIAMS,
By P. E. DYE,
Att'y of Record.

Filed May 16, 1887.

And now, to wit., May 16, 1887, it is ordered by the court that the appeal be allowed as prayed for.

WILLIAM A. RICHARDSON,
Chief Justice.

33 In the Court of Claims.

JOHN G. WILLIAMS, administrator *de bonis non* of Francis Taylor, deceased,
vs.
THE UNITED STATES.
No. 2186.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above entitled cause, of the findings of fact by the court and the conclusions of law thereon, of the opinion of the court, of the judgment of the court dismissing the petition, of the application of the claimant for the allowance of appeal to the Supreme Court of the United States, and of the order allowing said appeal.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court of Claims this 17th day of May, A. D. 1887.

[SEAL.]

JOHN RANDOLPH,
Ass't Cl'k C't of Claims.

IN THE COURT OF CLAIMS.

No. 2186.

JOHN G. WILLIAMS, ADMINISTRATOR, *vs.* THE UNITED STATES.

STATEMENT OF THE CASE.

This case was tried at the December term, 1879, and is reported in 15 C. Cls. R., 514. A motion for a new trial was made at the same term and has been pending since. The purpose of this motion is to establish the fact that Col. Francis Taylor, of the Albermarle Guards, continued in the service of the Continental Congress after the disbandment of his command in June, 1781, until the end of the war. The newly discovered evidence on which the motion rests consists chiefly of recently published volumes of the State Papers of Virginia. Several grounds are assigned for a new trial.

(1) A statute of Virginia provides for a commission "*to examine and report upon claims for unsatisfied military land bounties*" (act of March 11, 1834), and makes the decision of the governor of the Commonwealth upon such reports final. It now appears that the governor decided, September 19, 1850, that the heirs of Col. Francis Taylor were entitled to a land-warrant for his services as "colonel in the Continental Line from October 1, 1775, to the close of the war." This was not known when the case was tried.

(2) Certain resolves and proceedings of the Continental Congress, and certain resolves of the general assembly of Virginia and official correspondence in the first and second volumes of the State Papers of Virginia are also produced to establish the fact, or presumption, that Col. Francis Taylor was an officer in the Continental service from the year 1775 to the close of the war, September 3, 1783.

The Revised Statutes (§ 906) were relied upon by the counsel for the claimant to give effect to the decision of the governor of Virginia upon the report of the commissioner of that State in regard to the right of Col. Frances Taylor to a military land bounty.

OPINION.

Per Curiam.—The court is of the opinion that the section referred to relates properly to the authentication of State records, and that the last clause, which says the records "*so authenticated shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State from which they are taken*," does not impart to a State record so authenticated anything more than "*faith and credit*," and certainly does not extend the effect of a decision against a State to the General Government, nor make an award or judgment, which may be final against a State, either obligatory in law or conclusive as evidence against the United States.

But inasmuch as the counsel for the Government is willing that this question be presented to the Supreme Court, if the case shall be taken there, the findings of the court will be amended and refiled so as to show the approval of the governor of Virginia, on which the claimant now relies.

As to the resolves of the Continental Congress, and of the general assembly of Virginia, and the correspondence published in the State Papers of Virginia, the court is of the opinion that if they had been put in evidence on the trial they would not have changed the result; and the court is further of the opinion that if they establish a fact or presumption in favor of the claimant, the Supreme Court is as well authorized to take judicial cognizance of and give effect to them as is this court.

The order of the court is that the findings of fact and conclusions of law heretofore filed in this case be withdrawn from the files, and that the amended findings of fact and conclusions of law now filed stand as the findings and conclusions of the court, and that the claimant's motion for a new trial be overruled.

IN THE

Supreme Court of the United States.

No. 957.

JOHN G. WILLIAMS, *Administrator de bonis non of Francis Taylor, dec'd, Appellant,*

vs.

THE UNITED STATES.

APPEAL FROM THE DECISION OF THE COURT OF CLAIMS.

Brief for Claimant.

P. E. DYE,
Attorney of Record.

GEO. S. BOUTWELL,
Of Counsel.

[illegible]

IN THE

Supreme Court of the United States.

No. 957.

JOHN G. WILLIAMS, *Administrator de bonis non of Francis Taylor, dec'd, Appellant,*

vs.

THE UNITED STATES.

APPEAL FROM THE DECISION OF THE COURT OF CLAIMS.

Brief for Claimant.

STATEMENT OF THE CASE.

This is a claim for five years' full pay in virtue of the military service of Col. Francis Taylor, who was an officer in the Continental Service and Line from the State of Virginia in the War of the Revolution.

The petition alleges that Col. Francis Taylor, of the State of Virginia, entered the military service of the United States in the year 1775; that he continued in said service, either on duty or as supernumerary, and liable to be ordered on duty at any time, until the end of the war, in 1783. (P. 1 of Record.)

The subject of inquiry, as here presented, is this:

Did Taylor continue in the service until the end of the war, either on active duty or as a supernumerary?

That he was a colonel in the Continental service is proved. (Finding VIII, p. 8.)

At the time of the trial in the court below it was not known, either to the claimant or to his attorney, or to the Court, that a tribunal of the Commonwealth of Virginia, having jurisdiction of the subject, had passed upon this question, or had found it as a fact and reported it to the Legislature of that State in 1834, that Col. Francis Taylor had entered the Continental military service in 1775 and had continued in said military service to the end of the war.

It will not be out of place to state at this point what is an historical fact, namely, that most of the files and military records of the War Department pertaining to the Revolution were lost or destroyed either by the burning of the War Department, November 8, 1800, or at the capture of Washington in the War of 1812, and that the military records of the State of Virginia pertaining to the War of the Revolution were lost at about the last-named time, but were subsequently discovered in the attic story of the State Capitol in 1832 or 1833.

These facts were the occasion for the law being passed by the Legislature of that State creating a tribunal to examine and report upon the facts disclosed by those records, and pertaining to the service of the officers and soldiers in the War of the Revolution from that State.

As already stated, this case was tried before these facts became known, and the Court filed its findings of fact, (I to X, inclusive, pp. 7 to 11;) its conclusions of law 1, 2, 3, (p. 12,) and the opinion, all as they now stand. (Opinion, pp. 12 to 23.)

Almost immediately after the trial, new evidence having been discovered, and the fact of the findings of fact by the tribunal of the State of Virginia in 1834 having come to the knowledge of the claimant and his attorney, a motion for a rehearing on account of newly-discovered testimony and for error of law was filed.

The motion was denied, but the Court amended its findings by adding Finding XI, (pp. 11 and 12,) refusing, however, to allow claimant's request for findings, (p. 25,) viz:

> "Col. Francis Taylor was an officer in the Continental Service on the 22d day of March, 1783, and continued therein as such officer to the end of the war."

In refusing this finding the Court makes the following ruling, to wit:

> "Inasmuch as this finding involves a deduction from specific facts and circumstances which, so far as they are established by the evidence, are set forth in the previous findings and really involves a conclusion of law, it is refused."

The petition was dismissed, and from the judgment of the court the claimant appealed.

The claim is for the sum of $4,500, being the amount of five years' full pay of a colonel of infantry, authorized by the resolution of Congress of the 22d March, 1783, (4 Journal Cong., p. 178, Finding X, p. 11 of Record,) with interest thereon from the 3d day of September, 1783, the date of the final treaty of peace between the United States and Great Britain, to date, at the rate of six per cent. per annum, amounting to the sum of $32,310 in the aggregate.

This amount is due the claimant in virtue of the military service of Col. Francis Taylor in the Continental Line, in the War of the Revolution, from October, 1775, to the end of the war, 1783, under the provisions of the laws of Congress, as follows:

April 17, 1778 (Journal Cong., Vol. II, p. 517:)

"That an establishment of half-pay be made for the military officers commissioned by Congress who now are, or hereafter may be, in the service of these States, and shall continue therein during the war, and who shall not be annexed to any corps of established troops, or hold any office of profit under the United States, or any of them, and that such establishment take place after the conclusion of the present war."

May 15, 1778:

"*Resolved unanimously*, That all military officers commissioned by Congress who now are, or hereafter may be, in the service of the United States, and shall continue therein during the war, and not hold any office of profit under these States, or any of them, shall, after the conclusion of the war, be entitled to receive annually, for the term of seven years, if they live so long, one-half of the present pay of such officer: *Provided*, That no general officer of the cavalry, artillery, or infantry shall be entitled to receive more than the half part of the pay of a colonel of such corps, respectively: *And provided*, That this resolution shall not extend to any officer in the service of the United States unless he shall have taken an oath of allegiance to, and shall actually reside within, some one of the United States."

August 11, 1779 (*Ib.*, Vol. III, p. 336:)

* * * * * * *

"That all military officers commissioned by Congress, who are, or shall be, in the service of the United States, and shall continue therein during the war, shall, after the conclusion thereof, receive annually during their natural lives half of their pay." * * *

"That the half-pay provided by the resolution of the 15th of May, 1778, be extended to continue for life; and that the holding of a civil office under the United States, or any of them, shall be no bar to prevent any officer from receiving the same."

October 21, 1780, *Ib.*, Vol. III, pp. 538, 539:

"*Resolved*, That the commander-in-chief and commanding officer in the southern department direct the officers of each State to meet and agree upon the officers for the regiments to be raised by their respective States, from those who incline to continue in service and where it can be done by agreement, to be determined by seniority, and make return of those who are to remain, which is to be transmitted to Congress, together with the names of the *officers reduced*, who are to be allowed *half-pay for life*. That the officers who shall continue in the service to the end of the war shall also be entitled to half-pay during life, to commence from the time of their reduction."

That it was further resolved by Congress, March 22, 1783 (see *Ibid.*, Vol. IV, p. 178, 179:)

"That such officers as are now in the service, and shall continue therein until the end of the war, shall be entitled to receive the amount of five years' full pay, in money or securities, on interest at six per cent. per annum, as Congress shall find most convenient, instead of the half-pay promised for life by the resolution of the 21st day of October, 1780."

* * * * *

"That all officers entitled to half-pay for life not included in the preceding resolution may also, collectively, agree to accept or refuse the aforesaid commutation, signifying the same within six months from this time."

The provision for half-pay for life was never carried out, but the act of March 22, 1783, took its place.

Claimant's remedy is not barred or suspended by reason of the provisions of any statute of the United States.

If there ever was a bar or suspension of claimant's remedy, the same was removed by reason of the provision in the law of March 3, 1863, organizing the Court of Claims, and, for the purposes of this action, the claim accrued within six years, the claim having been referred by a resolution of the House of Representatives, and the petition setting forth the claim filed in the Court of Claims December 8, 1865, within three years from the date of said act.

It may not be out of place to remark that, by Article VI of the Constitution of the United States, all debts contracted and engagements entered into before the adoption of that instrument were assumed and made valid against the United States.

As we understand the position of the attorneys for the Government, the liability of the United States is not denied, if the evidence warrants the conclusion that Colonel Taylor continued in the service to the end of the war.

The claimant's right of recovery under this action will depend upon the fact whether Colonel Francis Taylor continued in the service to the end of the war or was retired before that time, and thereby became entitled to half-pay for life, or to the commutation therefor, under the provisions of the laws of Congress.

In the outset of this inquiry we desire to call attention to what the court has said in its opinion (p. 13:)

"The undisputed facts of the case are these:

"In December, 1778, Maj. Francis Taylor was one of the supernumerary officers who had been thrown out by that consolidation of regiments in 1778 which is best known as the White Plains arrangement.

"As such supernumerary he was liable to be called into service on the one hand, and entitled to half-pay for life on the other." (P. 13.)

Findings 111 (p. 7) prove that Colonel Taylor did not resign his commission in the Continental service, and that he was always ready and willing to render service when required so to do to the end of the war.

It being established that Colonel Taylor was entitled to half-pay for life, as a major, in December, 1778, the burden of the proof is cast upon the defendants to show, which they could not do, that he did not continue in the service to the end of the war; or it would be incumbent upon the defendants to show by what provision of law he forfeited his right to half-pay for life or to full pay for five years; and the failure to do this raises the presumption of law that the defendants could not disprove the service, and that he continued in the service to the end of the war.

The court further says of these "undisputed facts of the case:" "On the 19th December, 1778, the House of Delegates of the State of Virginia passed a resolution authorizing and directing the raising of a regiment in that State to guard the 'convention prisoners' from the captured army of General Burgoyne, and that a regiment was raised and received on Continental establishment; and that Major Francis Taylor was assigned to the command, and commissioned lieutenant colonel January 9, 1779; and that on the 5th of March, 1779, he was commissioned colonel, and continued in the command of the same regiment, the battalion being known as the 'Albermarle Guards,' or the 'Guards,' &c.; and that said regiment continued in service and was commanded by Colonel Taylor up to the 15th of June, 1781, when the regiment was disbanded; that is, the soldiers were either discharged or consolidated with other regiments in the service."

Now, it is not shown by the testimony or contended by the defendants that Colonel Taylor retired from the service in June, 1781, when the battalion of Guards was consolidated or disbanded, or that he again became a supernumerary.

Colonel Taylor was a supernumerary major at the time of his appointment to command the Guards; he was entitled to half-pay for life, and he was liable to be called upon for that or any other military service. Had he refused that service he would have forfeited the half-pay for life, which was, as the law stood, to begin at the end of the war, provided he continued in the service to the end of the war. Such were the limitations of the law at the time he became supernumerary major; and, beside this, the half-pay for life would attach in the higher grade he might reach in the service. There was, therefore, every reason why he should accept that service and the promotion in the higher grade on the one hand, and owing duty and service on the other, he could not have refused without subjecting himself to court-martial. (Lilley's case, 1 Leigh's R., 529, &c.)

It is not reasonable to assume that by accepting the command of the battalion of Guards, and the promotion to which he was entitled under the rules for promotion adopted November 24, 1778, (Journal Cong., Vol. 111, pp 132, 133, 134,) Colonel Taylor would be in a worse position than if he had remained a supernumerary major to the end of the war. If such an injustice could follow, it must arise from some extraneous circumstance, for there is nothing in the laws or usages of the service that can warrant such a conclusion.

True, the law providing half-pay for life was modified by the resolves of 3d and 21st October, 1780, while he was still commanding the Guards; but the change was only as to the time when the half-pay should begin. The modification provided that the half-pay should begin at the time of the reduction of the officer; that is, when he retired from the service. This modification of the law of half-pay for life was in force June 15, 1781, when the Guards were disbanded and consolidated, and under its provisions Colonel Taylor would have been entitled to half-pay for life in his new grade as colonel, to begin from the time that the Guards were disbanded, even if he had then retired from the service. And if he had been treated at that date as a supernumerary major, he would still have been entitled to half-pay in that rank, to begin June 15, 1781.

There is no evidence that Colonel Taylor was reduced in rank; and, therefore, the conclusion is inevitable that he was a colonel in the Continental army June 15, 1781.

The half-pay for life provision was never carried out, but a provision in lieu thereof, namely, five years' full-pay, took its place. (Resolution March 22, 1783.)

But the earlier provisions of the acts providing half-pay for life limited the promise to such officers as were commissioned by Congress, and a presentation of the law may throw light upon the subject.

Colonel Taylor was commissioned captain May 8, 1776, by Congress, and major in December, 1778, &c.

September 16, 1776, it was—

> "*Resolved*, That the appointment of all officers and filling up vacancies (except general officers) be left to the governments of the several States. * * * That all officers be commissioned by Congress." (*Ib.*, Vol. 1, p. 476.)

April 1, 1777 (*Ib.*, Vol. 2, p. 72:)

"*Resolved*, That it be recommended to the legislatures and, in their recess, to the executive powers of the respective States, that they forthwith transmit to the board of war exact lists of all officers appointed by them in the Continental army, with the dates of their commissions and times of appointment."

February 20, 1779 (*Ib.*, Vol. 111, p. 208:)

"*Resolved*, That the president of Congress, from time to time, transmit to the executive powers of the several States blank commissions for the officers of the line to be appointed by them, and that they be requested regularly to send the names of such officers to the board of war."

March 8, 1779 (*Ib.*, Vol. 111, p. 222:)

"*Resolved*, That all military commissions be filled up at the war office and attested by their secretary, and then presented for signing to the president of Congress, who shall sign the same," &c.

"*Resolved*, That all appointments of officers in the Continental service by the respective States be, in the first instance, by warrant, certified, in such manner as they shall severally direct, to the board of war; whereupon proper commissions shall be made out in the manner above mentioned."

June 28, 1779 (*Ib.*, Vol. 111, p. 314:)

"*Resolved*, That when vacancies of commissioned officers happen in any of the regiments raised by the respective States for the Continental army, notice thereof shall be given to the executive authority of the State to which the regiment belongs by the commanding officer of the regiment, to the end that proper persons may be appointed to fill the vacancies, agreeably to the resolution of the 8th of March last, having due regard to the rules of promotion recommended by a resolution of Congress of the 24th of November, 1778."

It should be observed that, by the resolution of January 9, 1779, raising the Albermarle Guards, as they were sometimes known, the governor and council of Virginia were authorized and empowered to make the appointments of the officers of said battalion out of those of the Virginia line who had been left out in the late arrangement of the Continental army. (P. 14.)

On February 4, 1779, (*Ib.*, Vol. 111, p. 196,) it was—

"*Resolved*, That the commander-in-chief be directed to proceed, in such manner as he shall judge expedient, to complete the arrangement of the army, and settle the relative rank of officers under the degree of brigadier, agreeably to the principles established by an act of Congress of the 24th day of November, 1778."

It was in pursuance of this resolution, as carried out by the commander-in-chief, that Colonel Taylor was commissioned colonel, and received the rank to which he was entitled in the Continental army March 5, 1779, even when he was still commanding the battalion of Guards, and the *fact* that he was then on duty commanding the regiment of Guards had nothing to do with his right to promotion to be a colonel in the Continental line, for the reason that under the rules of promotion established by Congress November 24, 1778, he was entitled "in the line of the State to the rank of colonel." (*Ibid*, Vol. 111, pp. 132, 133, 134.)

This is particularly emphasized for the reason that the court below (p. 15) says: "Under what authority or upon what theory this was done nowhere appears in official or historic records."

There were some modifications from time to time in the mode and manner of issuing the military commissions, as appears by the law, but the form was prescribed by Congress, and they were issued by its authority. They contained this clause: "This commission to continue in force until revoked by this or a future Congress, the committee of Congress before mentioned, or a committee of the States."

With these conditions the commission of an officer was without limitation. An officer might resign his commission or he might be cashiered, but unless he resigned or the commission was revoked it continued.

The letter of General Washington to Congress, dated October 11, 1780, (Vol. 8, pp. , Spark's Life of Washington,) throws light on this subject. He says there were not officers enough; that is, there was absolutely a scarcity of officers. He was anxious to have some arrangement by which the officers would become attached to the service, &c. He complained that so many officers were resigning, &c.

The soldiers the officers commanded might come and go, and changes of arrangement might take place in the formation of the army as the nature of the service might require, but the officer of the Revolution continued to hold his commission according to its terms, and was liable to be called upon to do duty while he so continued to hold his commission, and until he was retired agreeably to some one of the modes prescribed. (Lilly's case.)

The military service of an officer was a personal service and duty, which none but the officer himself could perform, and this service did not depend upon the name of the troop, company, or battalion which the officer may have commanded, or the length of the service of the soldiers composing the troop or battalion, or whether the same were composed of regulars or militia, or both.

ERRORS COMPLAINED OF.

First Error.

In the First Conclusion of Law (p. 12) the Court has assumed that the *ultimate* fact to be proven by the claimant in order to entitle him to recover is: "That a portion of the regiment of Guards re-enlisted for the war, and became soldiers in the Continental service after the battalion was disbanded on the 15th of June, 1781."

The claimant contends that the issue presented by the pleadings raises the question as to whether or not Col. Francis Taylor continued in the service to the end of the war, or whether he retired before the end of the war, entitled to half pay for life or to the commutation therefor, and that the *ultimate fact* to be proven is the duration of his own personal services, and not the duration of the service of the private soldiers or any of them composing the battalion of Guards which he at one time commanded.

Suppose that it had been shown that all the private soldiers of the Albemarle Guards re enlisted and served to the end of the war, we should then be at a loss to see how that circumstance would prove or disprove the fact of Colonel Taylor's own personal military service to the end of the war. The question is not whether the private soldiers, or some of them, served to the end of the war.

Col. Francis Taylor was a captain of militia in the State of Virginia, in the Continental service, in October, 1775. May 8, 1776, he was commissioned as a captain in the Second State Regiment of the Virginia forces on continental establishment.

In December, 1778, Maj. Francis Taylor was one of the supernumerary officers who had been thrown out by the consolidation of regiments in 1778. He was liable to be called into service, on the one hand, and entitled to half-pay for life, on the other. (Opinion, p. 13.)

December 19, 1778, he was lieutenant colonel of a regiment of new levies raised in the State of Virginia. January 9, 1779, he was commissioned lieutenant colonel and March 5, 1779, colonel in the Continental Army. He continued to command said Guards up to about June 15, 1781, when the battalion was disbanded and the soldiers discharged or consolidated.

Now, what has the individual service of the private soldiers composing these several commands, or any of them, to do with the personal military service of Colonel Taylor in the Continental Line to the end of the war?

Is it necessary, in order to entitle the claimant to recover for the services of Colonel Taylor to the end of the war, to show that the company of militia he commanded in October, 1775, or some of them, re-enlisted and became soldiers in the Second Virginia Regiment May 8, 1776, in Continental service, and continued in said regiment up to December, 1778, when Colonel Taylor became a supernumerary major and was entitled to half-pay for life, and liable to be called into service; or that the soldiers of the Second Virginia, or some of them, December 19, 1778, re-enlisted in the new levies raised in the State of Virginia for the war; or that the new levies, or some of them, re-enlisted in the battalion of Guards when Colonel Taylor was appointed lieutenant colonel, and assigned to the command of the Guards January 9, 1779?

When and while he was commanding the battalion of Guards March 5, 1779, he was commissioned colonel in the Continental line, to which he was entitled, without regard to the command of the Guards.

The absurdity of such requirements is too apparent to need further illustration. The claim of Colonel Taylor cannot be made to rest on such a chain of contingencies.

Second Error.

The Second Conclusion of Law of which complaint is made is the error in assuming the ultimate fact to be whether or not the battalion of Guards were reduced in pursuance of the resolutions of October 3 and 21, 1780.

If the question was whether Colonel Taylor became a supernumerary officer June 15, 1781, then and in that case the question assumed in the second conclusion of law might be a *circumstance* of importance, in showing that Colonel Taylor would have been entitled to half-pay as a supernumerary colonel by virtue of said resolutions, if it were further shown that he retired from service at that time. We are at a loss to see how the fact of the reduction of the Guards can become an *ultimate* fact to be proven, in view of the claims for services to the end of the war.

The claimant contends that the proofs show that he continued in the service to the end of the war; and the claimant contends, also, that he is not required to show either of the matters raised by the first or second conclusions of law; and he contends, further, that in truth and in fact it makes no difference whether or not the matters assumed in the first and second conclusions of law are sustained by the proofs or not.

Third Error.

As to the *Third Conclusion of Law* nothing need be said further than that it was never contended by the claimant that the act of July 5, 1832, was more than a legislative interpretation of the several resolutions of the Continental Congress promising to pay one half-pay and five years' full, &c., and not that any new liability on the part of the national Government was created thereby.

Fourth Error.

The *Fourth Conclusion of Law* embraces conclusions on the new findings of fact XI (pp. 11 and 12) and the provisional findings XII (p. 25.)

Claimant contends that findings XI is to be regarded in three aspects:

First. The facts found in finding XI prove and establish the allegation of the petition, namely, that Colonel Taylor entered the Continental service of the national Government October, 1775, and continued in said service to the end of the war.

Second. Findings XI (pp. 11 and 12) is a true copy of an official record of the Commonwealth of Virginia; and under Section 906 of the Revised Statutes it was claimed in the court below that full faith and credit should be given to it, not only as to the fact of the record, but also as to the fact that Colonel Taylor was in the Continental service to the end of the war. The following are the material parts of the section:

> "All records and exemplifications of books which may be kept in any public office of any State," * $ * "subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court," * * * "in any other State," * * * "by the attestation of the keeper of the said records," &c. "And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or county, as aforesaid, from which they are taken."

Third. It is claimed that findings XI embodies the judgment of a legally-constituted tribunal of the Commonwealth of the State of Virginia, and that such judgment is recognized by the legislative, judicial, and executive departments of said Commonwealth as final and conclusive on that subject. (Lilly's case, 1 Leigh's R., 563.) The claimant contends that the same is binding upon the courts of the United States, independent of the proofs of record which lead to the conclusion reached by the authorities of Virginia. Attention is called to the circumstances of the creation of that tribunal.

It is shown on page 23 of the record that March 11, 1834, the General Assembly of the Commonwealth of Virginia passed an act creating a commission to continue an examination, then already begun, of the documents pertaining to the War of the Revolution, and to report to the governor any information that might be found relating to unsatisfied claims against the national Government, &c., and to examine claims for military land bounty which might arise under the laws or resolutions of the General Assembly, and to report the facts, &c., *to the governor, whose decision thereon shall be final.*

It was during the examination of these revolutionary records that the facts of the continued service of Colonel Francis Taylor were discovered and reported to the governor, who rendered his decision on the facts disclosed by those records, which decision is embodied in findings XI.

The governor reported the facts, and his decision thereon, to the House of Delegates of that Commonwealth, and the same were printed in list No. 2, by order of the House of Delegates. (Doc. No. 31, Journal and Documents, House of Delegates, (Va.,) 1833–'34.)

Fifth Error.

The court erred in denying claimant's request (No. XII) for findings of fact and in holding the same to be a conclusion of law. Claimant contends that his twelfth request for findings of fact is a conclusion of *fact* drawn from other specific facts and circumstances established by the testimony, and that as to such fact he was entitled to have the same found by the court, who, in its office of "filing findings of fact," acts in the capacity of a jury rendering a special verdict.

Claimant contends that any specific fact which grows out of another fact, or out of a series of other facts or circumstances, can no more be called a question of *law*, than can the fact, or series of facts or circumstances, out of which the specific fact grows, be called questions of law. And, beside, claimant's twelfth request embraces the very question of fact involved in the pleadings.

If, however, the Court were correct in the opinion that the prayer was for a conclusion of law, we maintain that the Court erred in not finding that Colonel Taylor continued in service according to the terms of his commission.

CONCLUSION.

It is not controverted that the allegations of the petition bring the claim of Taylor within the terms of the resolutions of the Continental Congress, nor is it controverted that Taylor was entitled, upon proof of the truth of those allegations, to half-pay for life or to five years' full pay.

The claim is now made for five years' full pay.

If the proof sustains the allegations of the petition it follows that the provision of the Constitution guarantees payment.

The jurisdiction of the Court of Claims has not been questioned.

The claim of Taylor is supported by a series of facts, all consistent with each other, and it is sustained by circumstances which are inconsistent with any other theory than that Taylor was an officer of the Continental Army from 1775 to the end of the war.

The Court of Claims finds that Taylor was commissioned as captain, as major, as lieutenant colonel, and as colonel on the Continental Establishment, as it was called; that he was in the service continuously from May 8, 1776, to June 15, 1781, in the various grades named (Findings I and VIII), and that there is no evidence that Taylor ever resigned his commission in the Continental service, or that he was ever "otherwise than ready and willing to render service in the same or higher grade when required to do so." (Finding III.)

Upon these findings the conclusion of law must be that he continued in the service to the end of the war.

On the 15th day of June, 1781, Taylor held a commission as colonel in the Continental Army, which was not limited as to time. By its terms it was to run until he resigned, or died, or was discharged from the service by a competent authority, or was removed from office for misconduct. None of these facts are proved or even suggested.

On this state of facts the law must presume either that Taylor continued in office or that he did not continue in office. When it is shown that a man is in an office by a lawful title, by a tenure of good behavior, or for a term of years, or until the happening of some event, does not the law presume that he holds his office according to its tenure, and must not the magistrate wait for proof sufficient to control the presumption before he can give an adverse decision? Taylor had his office, his title, his tenure, and there is no evidence that he was dispossessed during the continuance of the war.

The Court of Claims found that Taylor continued in the service and in the rank of colonel until June 15, 1781. (Finding II.)

If this Court should find that the claim that Taylor continued in the service to the end of the war is not proved, it must yet be admitted that if Taylor was retired or *reduced* at any time subsequent to October 21, 1780, he was entitled to half-pay for life under the resolution of Congress of October 21, 1780. (Brief, p. 3.)

By the resolution of Congress of March 22, 1783, provision was made for the officers who continued to the end of the war and for those who were retired after the passage of the resolution of October 21, 1780. (P. 4.)

Each class had an option to accept five years' full pay in lieu of half-pay for life. The Court of Claims found that the officers of the Virginia line accepted five years' full pay in lieu of half-pay for life. (Finding IV.)

Next, the Court of Claims finds that the authorities of the State of Virginia, by a due course of proceedings, decided that Francis Taylor was a colonel in the Continental Line from October 1, 1775, to the end of the war. (Record, pp. 11, 12.)

We interpret this decision to mean that Taylor was a colonel at the end of the war, and that his service commenced October 1, 1775, but not necessarily in the grade of colonel.

The investigation by the authorities of Virginia was made in 1834 and previous thereto, when there were persons living who had knowledge of the events of the war. The conclusion reached by the State of Virginia seems to be important in two particulars:

(1.) It strengthens the presumption of law, as it is claimed in this brief, that Taylor continued in the service to the end of the war.

(2.) The record of the State of Virginia, duly authenticated, required the Court of Claims to render judgment for the claimant under the provision of the Revised Statutes heretofore cited. (S. 906.)

As to the first point, it may be maintained with propriety, we think, that the rules of evidence are not violated by accepting a record of the proceedings of a duly-authorized tribunal as testimony entitled to weight, even if the claim to absolute control be questioned or denied.

The propositions on which we rest the case of the claimant are these, viz:

1. The Court of Claims finds that Taylor was in the Continental service, holding the rank of colonel, as late as the 15th day of June, 1781.

2. The Court finds that there is no evidence that Taylor resigned or was removed or was discharged from the service previous to the close of the war.

3. On these facts, we claim that the Court should have held, as a conclusion of law, that Taylor remained in the service to the end of the war.

4. That the political department of the government of Virginia found that Taylor remained in the service to the end of the war.

5. That this finding supplements the findings of the Court of Claims and sustains by competent evidence the allegations in the petition.

6. That upon the findings of the Court of Claims, and without the support of the Virginia proceedings, the presumption of law would require the Court to give judgment in favor of the claimant.

7. The authenticated copy of the record of the proceedings in Virginia required the Court of Claims to give judgment for the claimant under the Revised Statutes. (S. 906.)

P. E. DYE,
Attorney of Record.

GEO. S. BOUTWELL,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 957.

JOHN G. WILLIAMS, *administrator de bonis non* of the Estate of Francis Taylor, dec'd, *Appellant,*

vs.

THE UNITED STATES, *Appellee.*

Appealed from the Court of Claims.

MOTION.

And now comes the appellant, by P. E. Dye, his attorney, and says that he is advised, and verily believes, that the Court of Claims has fallen into error in the findings of fact in the above-named cause, and that said error is material to the due presentation of said cause in the findings of fact. He, therefore, moves this Honorable Court to make an order remitting the record to the Court of Claims, that the said Court of Claims may consider and determine whether or not there be error in said findings of fact in the particulars hereinafter specified, viz:

1. In Finding 2, whether the words, "by the Governor of Virginia," should not be stricken out.
2. In Finding 8, line 4, whether the words, "by the Governor of Virginia," should not be stricken out.
3. In Finding 8, last paragraph of printed page 9, line 3, whether the words, "of the Albemarle Guards," should not be stricken out.

And, also, that said Court of Claims consider and determine whether any other findings of fact or conclusions of law are essential to the proper presentation of the case upon the appeal.

JOHN G. WILLIAMS, *Adm'r.*

P. E. DYE, *Attorney for Appellant.*
GEORGE S. BOUTWELL, *Of Counsel.*

Filed December 7th, 1887.

Appellant's Brief in Support of the Motion.

In support of appellant's motion to remit the record to the Court of Claims, on the ground that said Court has fallen into error in the findings of fact, as stated in the motion, the claimant shows this Honorable Court, that September 16, 1776, (Journals of Congress, Vol. I, p. 476,) Congress passed an act organizing the Continental Army, and provided, among other things—

> "That the *appointment* of all officers and filling up vacancies (except general officers) be left to the governments of the several States. * * * That all officers be *commissioned* by Congress."

This remained the law throughout the period of the revolution.

March 8, 1779, (*ibid.*, Vol. III, p. 222,) Congress

> "*Resolved*, That all military commissions be filled up at the War Office and attested by the Secretary, and then presented for signing to the President of Congress, who shall sign the same; after signature by the President, they shall be sent back to the War Office, and there registered *verbatim* in a book to be kept for that purpose; after having been examined by the Board, the seal of the Board of War and Ordnance, which the said Board are hereby authorized and directed to provide, shall be affixed to the certificate or attestation of the entries of all said commissions.
>
> "*Resolved*, That all *appointments* of officers in the *Continental service* by the respective States be, in the first instance, by warrant, certified in such manner as they shall severally direct, to the Board of War: whereupon proper *commissions* shall be made out in the manner above mentioned."

On the 9th January, 1779, (*ibid.*, Vol. III, p. 179,) Congress

> "*Resolved*, That a battalion, consisting of 600 men, properly officered, be forthwith raised on Continental establishment in Virginia, for the space of one year from the time of their enlistment, unless sooner discharged, under the direction of the governor and council of that State, *who are hereby empowered to appoint the officers of the said battalion out of those of the Virginia line who have been left out of the late arrangement of the Continental Army, as far as their numbers will reach*, the regiment to consist of one lieutenant colonel commandant and captain, one major and captain," &c.

This act limited the *appointments* in the battalion to officers of the Virginia line who were designated as supernumeraries; that is, those without an active command.

Colonel Taylor was then an officer of the Continental line assigned to the command of said battalion, but he was not, in tenure of office or term of service, identified with that corps.

As is seen by the terms of the act, the rank of the officer commanding the battalion was limited to one lieutenant colonel commandant and captain, &c., yet the record shows that on the 5th of March, 1779, Lieut. Col. Taylor was promoted to the rank of colonel.

In the opinion of the counsel for the claimant, the resolutions of the Continental Congress justify the conclusion that Colonel Taylor was an officer in the Continental line, and that the commissions issued to him as lieutenant colonel and colonel were issued by the officers of the Continental Congress in conformity to the resolution of the 16th of September, 1776, or to the resolution of the 8th of March, 1779. The designation of officers was made by the State authorities, but the commissions could be given only by Congress. It was error, therefore, for the Court of Claims to say of Francis Taylor that "he was commissioned as colonel by the Governor of Virginia."

It was also error for the Court of Claims to say that "Colonel Taylor was commissioned as colonel *of the Albemarle Guards.*"

P. E. DYE,
Attorney for Appellant.

GEO. S. BOUTWELL,
Of Counsel.

solution, may also

IN THE

Supreme Court of the Un

JOHN G. WILLIAM

Administrator de bonis non of Francis Taylor, deceased, **Appellant,**

vs.

THE UNITED STATES.

(SUPPLEMENTAL.)

FIVE YEARS' FULL PAY, IN LIEU OF HALF PAY FOR LIFE, OFFERED BY CONGRESS AND ACCEPTED BY THE OFFICERS OF THE ARMY.

(Journals of Congress, March 22, 1783.—Vol. IV, p. 178.)

* * * * * * *

Whereas the officers of the several lines under the immediate command of his excellency, General Washington, did, by their late memorial transmitted by their committee, represent to Congress that the half pay granted by sundry resolutions was regarded in an unfavourable light by the citizens of some of these States, who would prefer a compensation for a limited term of years, or by a sum in gross, to an establishment for life; and did, on that account, solicit a commutation of their half pay for an equivalent in one of the two modes above mentioned, in order to remove all subject of dissatisfaction from the minds of their fellow-citizens: and whereas Congress are desirous, as well of gratifying the reasonable expectations of the officers of the army, as of removing all objections which may exist in any part of the United States, to the principle of the half pay establishment, for which the faith of the United States hath been pledged; persuaded that those objections can only arise from the nature of the compensation, not from any indisposition to compensate es, sacrifices, and sufferings have so just a tion and rewards of their country: therefore,

Resolved, That such officers as are now in service, and shall continue therein to the end of the war, shall be entitled to receive the amount of five years' full pay in money, or securities on interest at 6 per cent. per annum, as Congress shall find most convenient, instead of half pay promised for life, by the resolution of the 21st day of October, 1780; the said securities to be such as shall be given to other creditors of the United States, provided it be at the option of the lines of the respective States, and not of officers individually in those lines, to accept or refuse the same; and provided, also, that their election shall be signified to Congress through the commander-in-chief, from the lines under his immediate command, within two months, and through the commanding officer of the southern army, from those under his command, within six months from the date of this resolution.

That the same commutation shall extend to the corps not belonging to the lines of particular States, and who are entitled to half pay for life, as aforesaid, the acceptance or refusal to be determined by corps, and to be signified in the same manner, within the same time as above mentioned.

That all officers belonging to the hospital department, who are entitled to half pay by the resolution of the 17th day of January, 1781, may collectively agree to accept or refuse the aforesaid commutation, signifying the same through the commander-in-chief within six months from this time; that such officers as have retired at different periods, entitled to half pay for life, may collectively, in each State of which they are inhabitants, accept or refuse the same, their acceptance or refusal to be signified by agents authorized for that purpose, within six months from this period; that with respect to such retiring officers, the commutation, if accepted by them, shall be in lieu of whatever may be now due to them since the time of their retiring from service, as well as of what might hereafter become due; and that so soon as their acceptance shall be signified, the superintendent of finances be, and he is hereby, directed to take measures for the settlement of their accounts accordingly, and to issue to them certificates bearing interest at 6 per cent.; that all officers entitled to half pay for life not included in the preceding resolution, may also collectively agree to accept or refuse the aforesaid commutation, signifying the same within six months from this time.

PROCLAMATION DISCHARGING THE OFFICERS OF THE CONTINENTAL ARMY AT THE CLOSE OF THE WAR OF THE REVOLUTION.

On report of the Committee of War, to whom was referred the letter of General Washington, Commander-in-Chief, dated September 19, 1783, Congress passed the following proclamation.

(Journals of Congress, Oct. 18, 1783.—Vol. IV, p. 299.)

By the United States in Congress assembled—A proclamation:

Whereas in the presence of an arduous and difficult war, the armies of the United States of America have evidently displayed every military and patriotic virtue, and are not less to be applauded for their fortitude and magnanimity in the most trying scenes of distress than for a series of heroic and illustrious achievements, which exalt them to a high rank among the most zealous and successful defenders of the rights and liberties of mankind:

And whereas, by the blessing of Divine Providence on our cause and our armies the glorious period has arrived when our national independence and sovereignty are established, and we enjoy the prospect of a permanent and honorable peace:

We, therefore, the United States, in Congress assembled, thus impressed with a lively sense of the distinguished merit and good conduct of the said armies, do give them the thanks of their country, for their long, eminent, and faithful services.

And it is our will and pleasure that such part of the Federal armies as stand engaged to serve during the war, and as by our acts of the 26th day of May, the 11th day of June, the 9th day of August, and the 26th day of September last, were furloughed, shall, from and after the 3d day of November next, be absolutely discharged, by virtue of this, our proclamation, from the said services.

And we also declare that the further services in the field of the officers who are deranged and on furlough, in consequence of our aforesaid acts, can now be dispensed with, and they have our full permission to retire from service, without being longer liable from their present engagements to be called into command. And of such discharge and permission to retire from service, respectively, all our officers, civil and military, and all others whom it may concern, are required to take notice, and govern themselves accordingly.

Given under the seal of the United States in Congress assembled. Witness: his excellency, Elias Boudinot, our president in Congress, this 18th day of October, in the year of our Lord 1783, and of the sovereignty and independence of the United States of America the eighth.

LEGISLATIVE CONSTRUCTION OF THE RESOLUTION OF THE 3D AND 21ST OF OCTOBER, 1780.

(Journals of Congress, March 8, 1785.—Vol. IV, p. 478.)

* * * * * * *

Resolved, That the officers who retired under the resolve of the 31st of December, 1781, are equally entitled to the half pay or commutation with those officers who retired under resolve of the 3d and 21st October, 1780.

COMMISSION OF THE OFFICERS IN THE CONTINENTAL LINE OF THE ARMY IN THE WAR OF THE REVOLUTION.

All commissions concluded as follows:

* * * * * * *

"This commission to continue in force until revoked by this or a future Congress, the committee of Congress before mentioned, or a committee of the States.

"Witness:———, President of the Congress of the United States of America, at———, the day of———, and in the———year of our independence. Entered in the War Office, and examined by the board.

"——— ———,

"*Secretary of the Board of War.*"

PROMOTED TO BE COLONEL CONTINENTAL LINE MARCH 5, 1779.

If it were necessary for the purposes of this argument to account for the fact of the promotion of Lieutenant-Colonel Francis Taylor to be colonel in the continental line on March 5, 1779, while he was in command of the battalion of guards, at Charlottesville and Winchester, Va., to which he had been assigned, it would be accounted for in this way:

His promotion was due entirely to his right of promotion in the continental line, as provided by act of Congress of November 24, 1778. (Vol. III., pp. 132, 133, and 134.)

"Whereas the settlement of rank in the army of the United States has been attended with much difficulty and delay, inasmuch as no general principles have been adopted and uniformly pursued:

"*Resolved, therefore,* That, upon any dispute of rank, the following rules shall be hereafter observed:

"1. For determining rank in the continental line, between all colonels and inferior officers of different States, between like officers of infantry, and those of horse and artillery, appointed under authority of Congress, by virtue of a resolution of September 16, 1776, or by virtue of any subsequent resolution prior to January 1, 1777, all such officers shall be deemed to have their commissions dated on the day last mentioned and their relative rank with respect to each other, in the continental line of the army, shall be determined by their rank prior to the 16th day of September, 1776. This rule shall not be considered to effect the rank of the line within any State, or within the corps of artillery, horse, or among the 16 additional battalions where the rank hath been settled, but shall be the rule to determine the relative rank within the particular line of artillery so far as the rank remains unsettled.

* * * * * * *

"3. In determining rank between continental officers, in other respects equal, proper respect shall be had to their commissions in the militia, where they have served in the continental army for the space of one month.

"4. All colonels and inferior officers appointed to vacancies since the 5th day of January, 1777, shall take rank from the receipt of commission to such vacancies.

* * * * * * *

"6. All officers who have been prisoners with the enemy, being appointed by their State, and again enter into service, shall do it agreeably to the following rule, that is to say: All of the rank of captain and under shall enter in the same regiment to which they formerly belonged; and if the regiment is dissolved or otherwise reduced, they shall be entitled to the first vacancy in any regiment of their proper rank, after the officers belonging to such regiment have been provided.

"7. The rules of rank above laid down between officers of different States are to govern between officers of the same State, except in cases where the State has laid down a different rule or already settled their rank.

* * * * * * *

"Whereas it will be for the interest of the service that some rule for promotion be established: therefore,

"*Resolved*, That it be recommended to the several States to provide, that in all future promotions officers rise regimentally to the rank of captain, and thence *in the line of the State to the rank of colonel*, except in cases where a preference may be given on account of distinguished merit.

* * * * * * *

"*Ordered*, That the Committee of Arrangement transmit to the Board of War lists of the officers of the army, arranged by them in the several regiments and corps, specifying the time of their respective appointments or promotions to their present rank, to be registered in the War Office; and that commissions be issued to the said officers accordingly; and the Secretary of the Board of War is hereby ordered to transmit copies of the said arrangement to the commander-in-chief of the army."

We have quoted for the information of the court such portions of the rules and regulations in force at the time for settling the rank and for governing promotions in the continental army as are deemed to have a bearing in answering the question proposed, and by which it is made to appear, incidentally, that up to the rank of captain, in case a regiment to which officers formerly belonged was "dissolved or otherwise reduced, they (the officers) shall be entitled to the first vacancy in any regiment of the State in their proper rank, after the officers belonging to such regiment have been provided," and that promotion from captain were in the line of the State to the rank of colonel.

These regulations were in full force and effect at the time Lt.-Col. Francis Taylor, appellant's decedent, was assigned to the command of the guards on January 9, 1779.

On February 4, 1779, the Commander-in-Chief, General Washington, was directed by Congress to carry out the said rules and regulations in the following words:

"*Resolved*, That the commander-in-chief be directed to proceed in such manner as he shall judge expedient to complete the arrangement of the army, and to settle the relative rank of officers under the degree of brigadier, agreeably to the principles established by an act of Congress of the 24th day of November, 1778; and that the Board of War furnish him with copies of the proceedings of the late Committee of Arrangement." (*Ibid*, Vol. III, p. 196.)

Thus it cannot be doubted that the carrying into effect by General Washington of these rules and regulations was the occasion of Lt.-Col. Taylor's promotion to be colonel in the continental line March 5, 1779, it having been found that he was entitled to that rank in the army.

We are led to make this point somewhat emphatic, for the reason that the court below seems to have fallen into the error in its opinion (p. 18 of record) that, in order for the promotion to have taken place March 5, 1779, "fresh legislation" would have been required "to authorize the promotion," seeming to lose sight of the fact that the commissions to officers in the continental line of the army were without limitation, that is, continued until the officers resigned or were otherwise properly relieved from the responsibility thereunder.

The soldiers the officer commanded might come and go; the soldiers may have been enlisted for six months, or for one, two, or three years, as the case might be; companies or regiments may have been consolidated, and the men transferred or discharged, but this did not put out the officers or relieve them from their commissions.

Officers in this way may have become supernumerary; in some instances, did, because they had no soldiers to command for the time being; but they were no less officers, because they had become supernumerary for want of a command, but they still continued to be in the service. (Lilly's Case, 1 Leigh's Rept., 563.)

The officer of the regular army to-day holds his commission for life, and he may be transferred from one command to another, and receive his promotion in the army; he may be assigned to new duty, as the exigencies of the service may require; he may resign his commission; he may be retired on arriving at a certain age, or he may be dismissed for cause, and on the finding of a court-martial; but unless he is dismissed or resigns, he continues to be an officer in the army during life.

His position does not depend in any manner upon the incidents of the terms of service of the soldiers he may command, whether the terms of their service be long or short.

The discharge or consolidation of the soldiers such officer may command for the time being does not work the revocation of the officer's commission. He still continues to be an officer in the army.

The officer in the continental line of the army in the war of the revolution held his commission in the same way, and unaffected by the incidents of the terms of service of the soldiers he might command.

The officer held his commission until revoked by Congress. He could be assigned to any new duty or command, as the exigencies of the service might require; but the discharge or consolidation of the soldiers he commanded did not work his own discharge or the revocation of his commission. He continued to be an officer all the same.

The case was quite different with a volunteer officer in the last war. A commission was not issued to the volunteer officer unless the proper number of soldiers had been enlisted and mustered, the commission being made directly dependent upon the term of service of the soldiers and their continuance in the service; and hence, the officer of the volunteer army of 1861 followed the incidents of the term of service of the soldiers he was called upon to command.

But such is not the tenure by which an officer of the regular army of to-day holds his commission, and was not the tenure by which the officer of the continental army held his, as already seen.

P. E. DYE,
Attorney of Record.

GEO. S. BOUTWELL,
of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

JOHN G. WILLIAMS, ADMINISTRATOR DE bonis non of Francis Taylor, deceased, appellant, *vs.* THE UNITED STATES.	No. 957.

ON APPEAL FROM DECISION OF THE COURT OF CLAIMS.

BRIEF OF APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

JOHN G. WILLIAMS, ADMINISTRATOR DE bonis non of Francis Taylor, deceased, appellant, *vs.* THE UNITED STATES.	No. 957.

ON APPEAL FROM DECISION OF THE COURT OF CLAIMS.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

This suit was brought to recover five years full pay (with interest thereon), claimed to be due the estate of Francis Taylor, deceased, by reason of his service as a colonel of infantry in the troops of the Commonwealth of Virginia in the Revolutionary war, the same being a commutation provided by a resolution of the Continental Congress of March 22, 1783 (Journals of Congress, vol. 4, pp. 178, 179), in favor of certain officers in the Continental service, in lieu of half pay for life, to which they were entitled.

In December, 1778, claimant's intestate, who was then a major, had been thrown out by the consolidation of regiments in 1778, which is best known as the "White Plains" arrangement, and was one of the supernumerary officers, liable on the one hand to be called into active service, and on the other to be left in retirement on half pay for life.

About that time the captured army of General Burgoyne, officially designated as the "convention prisoners," had been taken to Albemarle by the troops of the Virginia line, a portion of the Regular Army able and liable to do active field duty. The task of guarding these prisoners had been assigned to the State of Virginia.

At that time, as in all wars, it was found that there were many personswilling to enlist for guard or provost-marshal duty who were unwilling to encounter the privations, hardships, and dangers of active service in the field. Accordingly, it was suggested by Mr. Jefferson that a regiment be raised for the express purpose of guarding the convention prisoners.

On December 19, 1778, the house of delegates passed the following resolution, authorizing the raising of such a regiment:

> Whereas it will be exceedingly burthensome and inconvenient to the inhabitants of this Commonwealth to keep so large a body of militia on constant duty as will be necessary to guard the British prisoners which are now or may be stationed in this Commonwealth.
>
> *Resolved*, That the governor, with the advice of the council, shall be, and he is hereby, empowered to raise, as soon as possible, by voluntary enlistment,

> a regiment of soldiers, to consist of six hundred men, rank and file, with proper officers to command them, for the particular purpose of guarding the British prisoners aforesaid; and that he is empowered to offer a bounty, not exceeding thirty dollars, to each man so to be enlisted; and this house will make good the expense of raising, maintaining, clothing, and paying the said regiment; and until such regiment be raised, the governor is hereby empowered, with the advice of the council, to call out detachments of militia for the purpose of guarding the said prisoners. (Jour. House Delegates, p. 127.)

And on the 9th January following (1779) the Continental Congress, probably in pursuance of some private understanding with the authorities in Virginia, passed the following resolution:

* * * * *

> SATURDAY, *January* 9, 1779.
>
> A letter of the 6th, from the Board of War, was read, whereupon,
>
> *Resolved*, That a battalion, consisting of six hundred men, properly officered, be forthwith raised on Continental establishment in Virginia, for the space of one year from the time of their enlistment unless sooner discharged, under the direction of the governor and council of that State, *who are hereby empowered to appoint the officers of the said battalion out of those of the Virginia line who have been left out of the late arrangement of the Continental Army, as far as their numbers will reach.*
>
> The regiment to consist of one lieutenant-colonel, commandant and captain, one major and captain, six captains, one captain-lieutenant, seven lieutenants, nine ensigns, one surgeon, one surgeon's mate, eight

> companies of seventy-five men each, including corporals, three sergeants, one drum and one fife to each company.
>
> That these troops be stationed at, and not removed (except to such distance as the duties of the post may require) from, the barracks in Albemarle County, as guards over the convention troops; that they receive the usual pay of the Continental Army, and a suit of clothes as a bounty to each non-commissioned officer and private.
>
> That as soon as the said *regiment shall be so* far complete as to be able to do the duty of the post *the militia now in the service* there be discharged. (3 Jour. Cong., p. 179.)

Under these resolutions such a regiment was raised, and Maj. Francis Taylor was assigned to the command of it, with the rank of lieutenant-colonel. Thereafter it was known as the Albemarle Guards, and is occasionally spoken of simply as the "Guards."

> On the 5th March, 1779, Lieutanant-Colonel Taylor was commissioned as colonel of the regiment by the governor of Virginia. Under what authority or upon what theory this was done nowhere appears in official or historic records. We know from the Journals of Congress that there was no express or specific authority given for thus transcending the limit of rank expressly set by the resolution, 9th January, 1779, but the fact that he was thus commissioned is unquestioned.

* * * * *

On the 9th of January, 1780, the regiment was still in service, guarding the "convention prisoners," and continued so to serve for nearly three times the period of their original enlistment. Whether the men re-enlisted

is unknown, and by what authority the regiment thus continued upon Continental establishment can not be ascertained. The Journals of Congress are again silent, and no order or correspondence which would throw light upon the subject appears to exist; but it is unquestionable that the same regiment so commanded by Colonel Taylor continued thus in service until, under an order issued by the governor of Virginia (the convention's prisoners being removed into Maryland), the regiment was disbanded on June 15, 1781. This order of Governor Jefferson was as follows:

> IN COUNCIL, *March* 14, 1781.
>
> Col. F. TAYLOR:
>
> SIR: Before this comes to hand Colonel Wood will have received orders to carry the conventioners to Knowland's Ferry, thence to be guarded by the State of Maryland.
>
> At that place, therefore, you will please to discharge such of your regiment as were enlisted to serve only during the continuance of the conventioners in Albemarle or in this State.

The Continental Congress, by resolutions passed October 3 and 21, 1780 (3 Jour. Cong., 532, 538), determined to reorganize the Army in a manner which would involve the consolidation or reduction of regiments. The Army which was to be reduced, as designated by the resolutions, then consisted of sixteen "additional regiments," some or all of which had not been "annexed to the line" of any "particular State," of certain specifically-named irregular battalions and light corps, and of eighty battalions, known as the Continental Line. As to the "sixteen additional battalions," and the irregular battalions specifically named, the resolutions directed that they "be reduced" and the non-commissioned officers and privates "be incorporated with the troops of their respective States." This provision related to troops which had been raised directly by Congress, and its purpose was threefold: To sweep them out of existence as organizations, to transfer the men to the regular regiments of the Continental Line, and to credit them to the quotas of their respective States.

The resolution next provided, among other things, that the eleven regiments in the line furnished by Virginia should be reduced to eight, but no mention is made of the Albemarle Guards.

Having thus provided for the transfer of men and reduction of regiments, the resolutions further declared, with regard to the officers who would necessarily be thrown out by the reduction, as follows:

> And whereas by the foregoing arrangement many deserving officers must become supernumeraries, and it is proper that regard be had to them:
>
> *Resolved*, That from the time the reform of the Army takes place they be entitled to half pay for seven years, in specie or other current money equivalent, and also grants of land at the close of the war, agreeably to the resolution of the 16th September, 1776.
>
> *Ordered*, That a copy of the foregoing arrangement of the Army be sent to the Commander-in-Chief for his opinion thereon, and that if there shall appear no material objections the same be carried into immediate effect. (Resolution, October 3, 1780.)
>
> * * * * *
>
> Congress resumed the consideration of the report of the committee on General Washington's letter of the 11th, and thereupon * * *

Resolved, That the whole of the troops be enlisted during the war, and join their respective corps by the 1st day of January next.

That the Commander-in-Chief and commanding officer in the southern department direct the officers of each State to meet and agree upon the officers for the regiments to be raised by their respective States, from those who incline to continue in the service; and where it can not be done by agreement, to be determined by seniority, and make return of those who are to remain, which is to be transmitted to Congress together with the names of the officers reduced, who are to be allowed half pay for life. (Resolution, October 21, 1780.)

BRIEF OF ARGUMENT.

By an examination of the case (as reported in 15 C. Cls. R., 514), it will be seen that both the court and counsel for claimant understood the vital—in fact the only—questions in the case to be, whether a portion of the men of Colonel Taylor's regiment of guards re-enlisted for the war and became soldiers in the Continental service without the limitations attached to their original enlistment under the resolution of January 9, 1779, and whether said regiment was reduced under and in pursuance of resolutions of October 3 and 21, 1780, and the arguments of such counsel were wholly directed to convince the court that the evidence in the case was sufficient to establish the fact of such re-enlistment and reduction. The court looking into the case from that point of view, held that it was "constrained to say that the circumstances and coincidences so much relied upon, though they might appeal strongly as establishing a moral probability to a body possessed of legislative discretion, did not rise to the standard of legal evidence and were insufficient to authorize a judgment or sustain a verdict." But now counsel for claimant contend that the Court of Claims and the counsel who argued the case before that court were mistaken in supposing the vital questions in the case to be as stated above. They insist now, as will be seen by their first and second assignments of error, that the question to be determined is whether Col. Francis Taylor continued in the service to the end of the war, or whether he retired before the end of the war, entitled to half pay for life or to the commutation therefor, and that the ultimate fact to be proven is the duration of his own personal service, and not the duration of the service of the private soldiers or any of them composing the battalion of guards which he had commanded. It is contended that the proofs show that claimant's intestate continued in the service to the end of the war, and that claimant is not required to prove either of the matters raised by the first and second conclusions of law.

It is believed that the appellee may with safety rest its case upon the able and elaborate opinion of the court below as to the question of the ultimate facts required to be proven by the claimant and his failure to prove said facts.

The following is quoted from the opinion of the court:

> No authenticated document nor official record has been produced to show that a single soldier of Colonel Taylor's regiment had re-enlisted for the war, or was liable to serve beyond the limits of the State of Virginia, or could have been transferred to regiments of the line under the resolutions. No such averment

was made by Colonel Taylor himself in his petitions to Congress and the house of delegates, nor is it alluded to in any contemporary report, letter, or communication. Neither the house of delegates, in 1783, nor the Secretary of War, General Knox, in 1791, regarded the Albemarle Guards as one of the regiments which had been reduced and consolidated under the resolutions of 1780; and the silence of the resolutions themselves, with all their particularity as to other commands, indicates that the Continental Congress were not aware of there being soldiers in the Guards who were liable to be transferred to the line.

Moreover, the time when the regiment was disbanded, June 15, 1781, was subsequent to the consolidation of the Virginia regiments by the Baron Steuben (February), and the apparent cause of disbandment was not its consolidation with other regiments, but the termination of the service or duty for which it had been raised and on which it had been exclusively engaged. The mention of the Guards in the resolutions, February 9, 1780 (3 Jour. Cong., 432), and in the correspondence of Mr. Jefferson with General Washington, on which great stress was laid in the argument, was applicable to the regiment, whether its soldiers had re-enlisted or not; for it was proper and just that its soldiers, who were continuing in the service beyond the period of their enlistment, and who, in all seeming likelihood, were to continue in the service of guarding the prisoners till the end of the war, should be credited to the quota of Virginia. The language of the resolution is as follows:

"*Resolved*, That for the ensuing campaign the States be respectfully required to furnish, by drafts or otherwise, on or before the first day of April next, their respective deficiencies of the number of 35,211 men, exclusive of commissioned officers, which Congress deem necessary for the service of the present year.

"That the quotas of the several States be as follows:

New Hampshire	1,215
Massachusetts Bay	6,070
Rhode Island	810
Connecticut	3,238
New York	1,620
New Jersey	1,620
Pennsylvania	4,855
Delaware	405
Maryland	3,238
Virginia	6,070
North Carolina	3,640
South Carolina (exclusive of blacks)	2,430

"That all the men *whose times of service do not expire before the last date of September next* be counted towards the quotas of the States to which they respectively belong, whether they compose the battalions in the line of the several States, those of the additional corps, *including the Guards*, the artillery and horse, or the regimented artificers in the departments of the quartermaster-general and commissary-general of military stores, who, being credited to the States, respectively, should be provided for, deemed, and treated in the same manner with the men in the several State lines; and it is recommended to the several States to make like provision for the officers and men of the artillery, horse, additional corps, *including the Guards*, and regimented artificers, as may be made in pursuance of any resolution of Congress, for the officers and men of their respective battalions, with such exceptions, respecting the regimented artificers, as have been made by Congress in their acts concerning them." (Resolution 9th February, 1780, 3 Jour. Cong., p. 432.)

The first purpose of the resolution was manifestly to fix and determine the number of men which each State should contribute. The second likewise related to State quotas, being a declaration that all of the men whose terms of service would not expire before the last of September, following should be credited to their respective States, accompanied by a pledge that the men (not the officers and men) of certain irregular organizations, "including the Guards," "should be provided for, deemed, and treated in the same manner" as the men in the line. The third provision was a recommendation to the States "to make like provision for the officers and men" of the designated irregular corps, "including the Guards," as might be made "for the officers and men of their respective battalions." In the first provision the Guards were referred to as a corps which had or which might have had men who should be credited on the quota of Virginia; in the third the officers and men of the Guards are designated as among those for whom the States should make the same provision which they would make "in pursuance of any resolution of Congress" for the officers and men of their respective battalions.

It is true that the language of the resolution does seem to indicate that then, on the 9th of February, 1780, there were men in the Guards "whose times of service do not expire before the last date of September next." But it is also true that the words "including the Guards," in the first provision, may have been intended merely as a comprehensive, sweeping clause, equivalent to saying that all men whose times of service did not expire, in whatever corps they might be found, should be counted upon the quota of Virginia, and that the same words in the third provision were intended as new legislation, as a special provision to classify the Guards who were

> continuing to serve beyond their times of enlistment with men whose enlistment would not expire "before the last day of September next."
>
> Be that as it may, we can not accept the ambiguous phraseology of the resolution as authoritatively fixing the desired fact that the Guards, or a portion of them, had re-enlisted for the war and were liable to be reduced and consolidated under the resolutions which followed in October of the same year. It was proper and just that these officers and men should be thus provided for; but it does not follow that such a recognition establishes a fact that they stood on the same basis of enlistment for the war and for service in the field that the troops of the line stood upon.
>
> Finally the depreciation pay, which, under the resolution, 10th April, 1780, was only to be given to persons who "had engaged to serve during the war or for three years, may well have been allowed to Colonel Taylor as a supernumerary officer in actual service by virtue of the terms of his original enlistment. But whatever the theory upon which it was allowed, we can not infer from it the fact that Colonel Taylor's regiment in whole or in part had re-enlisted for the war, and that he had been reduced under the resolutions of October, 1780. Upon the whole of the evidence we must rule that it is insufficient to sustain a verdict, and that we are not at liberty, when sitting in the stead of a jury, to pass upon it or to deduce ultimate facts from it."

Whether claimant's counsel mean to be understood as contending that proof of service by Colonel Taylor during the entire war or his retirement from service before the close of the war would be sufficient to entitle him to half pay for life, under the resolutions of October, 1780, or whether the claim is based upon the other resolutions of May 15, 1778, and August 11, 1799 (p. 3, Brief), we are left in doubt. As it is admitted, however (on p. 6, Brief), that the law providing half pay for life antecedent thereto was modified by the resolves of October, 1780, it is presumed that their claim is that under those resolves a continuous service throughout the war by Colonel Taylor, or his retirement before the close of the war, entitled him to half pay for life. This position is not only untenable and directly in conflict with the views of both the court and counsel for claimant, when the case was tried below, but it will be seen that the resolution of October 3, 1780, provided half-pay for seven years only for those supernumerary officers who became such under the arrangement provided for by those resolutions, and the resolutions of October 21, 1780, had reference only to the same officers, whose names were to be transmitted to Congress. Counsel state (p. 6, Brief) that the change made by resolutions, 3d and 21st of October, in the law providing half pay for life was only as to the time the half pay should begin; that the modification provided that the half pay should begin at the time of *reduction* of the officer.

The brief continues as follows :

> **This modification of the law of half pay for life was in force June 15, 1781, when the Guards were disbanded and consolidated, and under its provisions Colonel Taylor would have been entitled to half pay for life in his new grade as colonel, to begin from the time that the Guards were disbanded, even if he had been retired from the service.**

It was understood on the argument of the motion for rehearing, that the contention of claimant's counsel was that the alleged newly discovered evidence was convincive of the alleged fact that Colonel Taylor served throughout the entire war, and that the claim was based upon such service, and it would now seem from their brief that their contention is that he did serve continuously throughout the whole war.

Whether Colonel Taylor retired from the service at the time his regiment was disbanded, or whether he continued in service to the end of the war, he clearly was not a *reduced* officer within the meaning of that word as used in the resolutions of October 3 and 21, 1780. Those resolutions provided a plan for the reorganization of the whole Army, and it was to be carried into effect without delay; the scheme was not a continuing one, and was not intended to, and did not apply to, such organizations as the Guards, whose service, after their term of enlistment had expired, was indefinite as to time, and restricted in the other respects already mentioned, nor did the resolution apply to officers not reduced under them, who continued in service to the end of the war. An officer who left the service at the end of the war was not *reduced.*

Claimant's counsel contend that the evidence in the case is sufficient to show that Colonel Taylor continued in the service to the end of the war, and assigns as error the denial by the court of their twelfth request for findings (Rec., p. 25). It is submitted that the court below was clearly right in holding that the preceding findings contained all the facts which had been established by the evidence in the case, and that that request for findings involved an unwarranted deduction from the facts and circumstances, and further, that the finding really involved a conclusion of law. Again, said finding could not properly have been made by the court, because the question of Col. Francis Taylor's continuance in the service during the entire war was and is of no sort of consequence. He must, to have been entitled to five years' full pay as commuted by resolution of March 22, 1783, have been reduced under the resolutions of 1780.

As to the fourth assignment of error, this court is respectfully referred to the opinion of the court below on motion for a new trial, being No. 2186, December term, 1886–'87. It certainly does not require argument to show that the fourth conclusion of law, which is claimed to be erroneous, is right.

In *Dr. Charles Taylor's Case* (13 C. Cls. R., 395, 400) the court held that the claimant, an officer of Col. Francis Taylor's regiment, "never became entitled to half pay or commutation, inasmuch as the regiment did not continue in service to the end of the war"; also, "that he was no longer in service" after the regiment was discharged. These views were expressly affirmed by this court on appeal. (See No. 1058, October term, 1878, Opinion of the Court, delivered by Waite, Chief Justice.)

The Court of Claims, in its opinion in that case, said:

> It is manifest that the Continental Congress regarded reduction to a supernumerary as in one sense degredation, and intended the half pay for life as compensation for the loss of full pay during the war, with the consequent chances of promotion. It is also manifest that they regarded an appointment in the regiment of Guards as preferment, and a means for

relieving an officer from the loss and mortification of being a supernumerary. Certainly it can not be pretended that the Congress considered these things as cumulative, and intended that a person should at the same time draw full pay as an officer of the Guards and half pay as a supernumerary. It also seems indisputable that if the Guards had remained in service until the end of the war Dr. Taylor would have been entitled to half pay for life as a surgeon, and would not have been relegated to his former position as a supernumerary—surgeon's mate. And yet, again, it seems equally clear that he would not have been entitled to retire at the end of the war with half pay as a surgeon and likewise with half pay as the supernumerary—surgeon's mate.

To sum up the matter in a few words, there is no reason for supposing that the Continental Congress intended these positions to be cumulative, nor that they intended that an officer should have the advantages of full pay and promotion in the Guards and then resume the compensation intended for those who have been deprived of them. It is impossible to hold that the same man was at the same time both an officer in service and a supernumerary out of service. There was no compulsion in serving in the Guards; no one knew that the service might not continue to the end of the war; the officer had his option of accepting the preferment or retaining his position as supernumerary; but by accepting the one he resigned the other. We have no doubt that this was well understood at the time, and that it accounts for these officers never having presented claims for pay as supernumeraries.

As has been stated, Col. Francis Taylor was a supernumerary officer at the time of the organization of the Albemarle Guards, and in the same condition precisely as

was Dr. Charles Taylor. Under the decision in that case the present suit can not be maintained, and the argument of counsel, as contained in their brief (pp. 5 and 6), is in direct conflict with the decision; their claim being that the half pay to which Colonel Taylor was admittedly entitled as a supernumerary officer at the time he took command of the Albemarle Guards continued after he had taken command, whilst the court held in Dr. Taylor's Case that he forfeited his right to half pay as a supernumerary officer by his acceptance of the position of surgeon's mate in the regiment of Guards.

There are no acts or resolutions under which Colonel Taylor could have become entitled to five years' full pay in lieu of half pay for life except those of October 3 and 21, 1780, and of March 22, 1783. It is clear that he was not within the terms of the two resolutions first named, and it is respectfully submitted that he was not within the terms of the last-named resolution.

That resolution provides in the first place for such officers as were then in service and should continue therein to the end of the war, the commutation of five years' full pay for the half pay for life promised by the resolution 21st of October, 1780.

Two provisos were added, the first being that the option to accept or refuse the said commutation should be exercised by the lines of the respective States and not by the officers individually, and the second that their election should be signified to Congress through the commander-in-chief from the lines under his command within two months, and through the commanding officer of the Southern army from those under his command within six months from the date of the resolution; that the same commutation should extend to the corps not belonging to the line of particular States and who were entitled to half pay for life, *as aforesaid;* such acceptance or refusal to be determined by corps, and to be signified in the same manner and within the same time. Next following this is a provision in favor of officers belonging to hospital department; and next for such officers as had retired at different periods, entitled to half pay for life, who were to, collectively in each State of which they were inhabitants, accept or refuse said commutation, and signify their acceptance or refusal to agents authorized for that purpose within six months of that period. Such acceptance by such retiring officers was to be in lieu of whatever might be then due to them since the time of their retiring from the service as well as of what might thereafter become due, and that so soon as their acceptance or refusal should be signified the superintendent of finance was directed to take measures for the settlement of their accounts accordingly, and to issue to them certificates bearing interest at 6 per cent. By the next and last clause provision was made for all officers entitled to half pay for life not included in the preceding resolution, and said officers were also collectively to agree to accept or refuse said commutation, signifying the same within six months of that time.

There is no provision in this resolution under which Colonel Taylor could have become entitled to the commutation therein provided for. He could not claim under the resolution of October, 1780, because he was not reduced under these resolutions; and then, too, the acceptance or refusal of the commutation was to be by the lines of the respective States and not by the officer individually, and their election was to be signified to Congress as above stated. It is not pretended that Colonel Taylor accepted, together with other officers of the line of his State, the commutation. In regard to the next provision in favor of corps not belonging to the line of the particular States, *their* acceptance or refusal was to be determined by corps and was to be signified in the same manner. Of course the next provision in favor of the officers belonging to the hospital department did not apply to Colonel Taylor. It is not seriously contended that the next provision in regard to retired officers entitled to half pay applied to Colonel Taylor, and if it were, they were collectively, in each State of which they were inhabitants, to accept or refuse the same, such acceptance or refusal to be signified in the same manner above mentioned and certificates issued to them. It is not pretended that Colonel Taylor met with other officers and decided Whether ~~not~~ to accept or refuse the commutation. Colonel Taylor could not be entitled to the commutation under the last clause, extending it to all officers not included in the preceding resolution, because they also were collectively to agree to accept or refuse the said commutation and signify the same within six months from that time, and it is not pretended that Colonel Taylor met with other officers and decided whether to accept or refuse the commutation.

It may properly be added that the Virginia line did accept the offer of commutation under the resolution of March 22, 1783, and therefore, if Colonel Taylor had any claim to the same, it was waived by the acceptance of the offer by the line.

The special plea (Rec., pp. 4 and 5) raised the question of bar of the claim of the appellant; and it is submitted the claim was barred by the resolutions and statutes referred to in the plea.

It is respectfully submitted that there is no error in the record complained of, and that the judgment of the court below should be affirmed.

A. H. GARLAND,
Attorney-General.
ROBERT A. HOWARD,
Assistant Attorney-General.
LEWIS COCHRAN,
Assistant Attorney.

Office Supreme Court U. S.
FILED.
OCT 22 1890
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

JOHN G. WILLIAMS, ADMINISTRATOR DE bonis non of Francis Taylor, deceased, appellant,
vs.
THE UNITED STATES.

No 46. Supplemental.

ON BEHALF OF APPELLEE.

In the Supreme Court of the United States.

JOHN G. WILLIAMS, ADMINISTRATOR DE bonis non of Francis Taylor, deceased, appellant, *vs.* THE UNITED STATES.	No. 46. Supplemental.

ON BEHALF OF APPELLEE.

The claimant in the supplemental brief submitted, quotes at length the resolutions of March 22, 1783, but omits to point out the subdivision thereof under which payment is claimed. The petitition emphasizes the acceptance of the Virginia line, but it does not now appear clearly that claimant rests, anywise, upon such acceptance.

The principal allegations of the petition as set forth in the record are:

(1) That Col. Francis Taylor entered the service in in 1775 and continued on duty, or as supernumerary, and liable to be ordered on duty at any time until the end of the war.

(2) That it was resolved by Congress: (Here follow the provisions of the resolutions of October, 1780, and March 22, 1783.)

(3) "That the Virginia line formally accepted the five years' full pay in lieu of half pay for life according to the terms of the proviso," etc.

(4) "That the said Colonel Francis Taylor was entitled, under the foregoing resolutions and acceptance," to the five years' full pay and interest at 6 per cent. per annum from 1783.

It is manifest from a comparison of the findings and opinion presented in the record, with the positions taken in claimant's briefs on this appeal, that the questions tried and submitted below are not those now sought to be placed before this court.

The vital questions below were, whether the regiment in question, the Albemarle Guards, had been "reduced" so as to retire Colonel Taylor and thus bring him within the resolutions of October, 1780, and March 22, 1783, and whether the guards, or a portion of them, re-enlisted and served to the end of the war.

Now, the contention is to show that Colonel Taylor remained and continued in the Continental service from 1775 to the end of the war, and that because of that service and of the resolutions referred to claimant is entitled to recover.

Thus a vital element of the petition is abandoned, and the court below is complained of for deciding the questions litigated before it. (Claimant's brief, pp. 9, 10.)

THE REPORT OF THE COMMISSIONER OF VIRGINIA.

The fourth assignment of error relates to the fourth conclusion of law, and to finding of fact XI (Rec., pp. 11, 12), and to the acts of the general assembly of Virginia and of its commissioner and governor, set forth pages 23–25.

Claimant insists, in substance, that such action is conclusive upon the United States.

The proceedings occurred fifty years after the close of the war and were not participated in by the General Government.

It is sought to establish by them the continued service of Colonel Taylor in the Continental Army throughout the war, against the facts and findings of the case.

Commissioner Smith was to examine for unsatisfied claims of the Commonwealth against the Government of the United States, and to examine all claims for military land bounties, and report the facts relating to the same, together with any remarks which he should deem pertinent and proper, to the governor, * * * whose decision thereupon should be final.

The report made by the commissioner, now under consideration, relates only to a bounty land claim, and turns upon the grade of service, whether major or colonel.

The conclusion relied upon by claimant is, at most, only incidental.

The appellee begs to present, as a sufficient answer to this assignment of error, a portion of the opinion delivered upon the motion made for new trial in the court below, (22 C. Cls. R., 117), which is as follows:

> *Per curiam:* The court is of the opinion that the section referred to relates to the authentication of State records, and that the last clause, which says that records "*so authenticated shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State from which they are taken,*" does not impart to a State record so authenticated any-

thing more than "*faith and credit*," and certainly does not extend the effect of a decision against a State to the General Government, nor make an award or judgment which may be final against a State either obligatory in law or conclusive as evidence against the United States.

SERVICE IN THE ALBEMARLE GUARDS.

The White Plains arrangement by which Taylor became a supernumerary major occurred in September, 1778.

The resolution of the house of delegates to provide for creating the guards was passed December 19, 1778.

The governor, with the advice of the council, was empowered to raise a regiment of six hundred men, with proper officers to command them.

The co-operating action of Congress was January 9, 1779.

A battalion of six hundred men is to be raised * * * under the direction of the governor and council, who are empowered to appoint the officers "out of those of the Virginia line who have been left out of the late arrangement."

No requirement appears that these officers shall be selected from those holding the same rank. It is evident that Major Taylor became lieutenant-colonel by an exercise of the power "to appoint" given by the resolutions of Congress. Except for the clause therein men might have been selected for this home duty who had seen no service. There is no evidence tending to show that Taylor ever became a lieutenant-colonel of the Continental line.

The commission as colonel came from the governor. (Record, pp. 7, 15.)

The order to discharge the Guards also came from him (p. 15).

The explanation must be that "The Guards" was an irregular regiment created for a particular service and charged with a specific duty to be performed in a designated locality.

A supernumerary major might well deem it creditable to himself to be appointed to the command of this regiment.

But service in it was inconsistent with service in the Continental Army.

Such commission as Francis Taylor held prior to January 9, 1779, was practically revoked by the Congressional authorization to appoint supernumerary officers to this regiment, by his appointment, and his acceptance thereof.

An obligation taken by the officer to serve in the guards disqualified him for continuance as a supernumerary in the Continental service.

Colonel Taylor could not perform his duty under his commission as the commanding officer of the Albemarle Guards and at the same time hold himself ready to respond to a call for service in the field.

DR. CHARLES TAYLOR'S CASE.

Dr. Charles Taylor's Case (13 C. Cls. R., 395, and 14 *id.*, 590) is in point.

Dr. Charles Taylor was a surgeon's mate in the Continental Army from 1776 to 1778, and then became a supernumerary. He was appointed surgeon's mate in the Albemarle Guards under resolution of January 9, 1779, and accepted and held the position. In October of that year he was appointed to be surgeon of that regiment, and held the place until June 15, 1781, when the regiment was disbanded. He made claim for five years' full pay as surgeon in the Virginia line of the Continental Army under the same resolutions, legislation, and proceedings as are now relied upon in Colonel Francis Taylor's Case.

The decision of the Court of Claims in Dr. Taylor's Case is stated in appellee's brief, page 15.

Upon appeal to this court the decision of the Court of Claims was affirmed, the following being the opinion upon such affirmance (14 C. Cls. R., 591):

> Mr. Chief-Justice Waite delivered the opinion of the court:
>
> From the findings of fact sent up with this appeal we are clearly of the opinion that Dr. Taylor did not "continue in service until the end of the war" within the meaning of the resolutions of Congress of October 21, 1780, and of March 22, 1783, under which the claim in this case is made. When he accepted his appointment in the regiment of guards, January 9, 1779, he ceased to be a supernumerary surgeon's mate and became an active officer in the new regiment. Consequently, when that regiment was discharged, because its term of enlistment had expired, he was out of service. When the new regiment was raised the governor and council of Virginia were authorized by Congress to appoint its officers out of those in the Virginia line who were then supernumerary. Although it is said in one of the additional findings that Dr. Taylor was "assigned to active duty," this is to be construed in connection with the resolution to which reference is made, and that being

done, it is apparent there was no intention by that language to modify the previous finding that "he was appointed surgeon's mate of the regiment of guards authorized by the resolution of January 9, 1779, of the Continental Congress." By the resolution Congress permitted the supernumery officers in the line to accept appointments in the new regiment. Such an acceptance took them out of their former position in the line and put them into the new organization.

The judgment of the Court of Claims is affirmed.

It is respectfully submitted that Dr. Charles Taylor's case is conclusive as to the case at bar, and that the judgment of the court below should be affirmed.

A. X. PARKER,
Assistant Attorney-General.

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In the Supreme Court of the United States.

October Term, 1887.

John G. Williams, administrator
de bonis non of the estate of Francis
Taylor, deceased, appellant,
vs.
The United States, appellees.

No. 957.

ON APPEAL FROM THE COURT OF CLAIMS.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

JOHN G. WILLIAMS, ADMINISTRATOR de bonis non of the estate of Francis Taylor, deceased, appellant, *vs.* THE UNITED STATES, APPELLEES.	No. 957.

ON APPEAL FROM THE COURT OF CLAIMS.

DEFENDANTS' BRIEF ON MOTION TO REMIT RECORD TO THE COURT OF CLAIMS.

This is a motion by the appellant for an order remitting the record to the Court of Claims, that the Court of Claims may consider and determine whether or not there be error in the findings of fact in the case in certain particulars specified in the motion.

First. It is alleged that the court below erred in Finding 2 and Finding 8, in stating that Colonel Taylor was commissioned as colonel by the governor of Virginia; and,

Second. That the court erred in Finding 8, in stating that Colonel Taylor was commissioned as colonel of the Albemarle Guards.

It is submitted by the defendants that this motion should not, for many reasons, be granted.

First. The Albemarle Guards were enlisted not only for a limited period, but also for a limited, designated service, and that service was to be rendered within exceedingly narrow territorial limits. They were enlisted to relieve troops of the Virginia line, to whom had been assigned the duty of guarding the convention prisoners, and who were a portion of the regular Army, able and liable to do active field service.

The resolution of the house of delegates, passed December 19, 1778, authorizing and directing the raising of such a regiment, is set out on pages 13 and 14 of the record, from an examination of which it will appear that the governor of Virginia was empowered, with the advice of the council, to raise said regiment of Guards, with proper officers to command them, for the particular purpose of guarding the British prisoners; and that he was empowered to offer a bounty to each man so to be enlisted; and that the said house of delegates would make good the expense of raising, maintaining, clothing, and paying the said regiment; and that, until said regiment was raised, the governor was empowered, with the advice of the council, to call out detachments of militia for the purpose of guarding said prisoners.

The resolution of the Continental Congress of January 9, 1779, is set out in claimant's brief on motion (p. 2), and, following the resolution of the house of delegates, provided for the raising of said battalion of Guards for the space of one year from the time of their enlistment, unless sooner discharged, *under the direction of the governor and council of that State*, who were thereby empowered to appoint the officers of the said battalion out of those of the Virginia Line who had been left out of the late arrangement of the Continental Army, as far as their numbers would reach.

The resolution further provided, that the regiment should consist of officers of certain grades and of companies consisting of 75 men each. It was then provided that the said troops should be stationed at, and not removed, except to such distance as the duty of the post might require, from the barracks in Albemarle County as guards over the convention troops.

In the case of *Dr. Charles Taylor* (13 C. Cls. R., 395–400) the Court of Claims held that Dr. Taylor, who was a supernumerary officer at the time of the organization of the Albemarle Guards (as was claimant's intestate), forfeited the half-pay for life, to which he was entitled as such supernumerary officer, by accepting the position of surgeon's mate in the Guards, and that he was *no longer in the service after the regiment was discharged.* These views were expressly affirmed by this court on appeal. (See No. 1058, Oct. term, 1878, opinion of the court, delivered by Waite, Chief Justice.)

These two officers, Col. Francis Taylor and Dr. Charles Taylor, both having been at the time of the organization of the Guards supernumerary officers under the White Plains arrangement, and both having been appointed officers in the Guards, it is submitted that claimant's present contention is in direct conflict with this decision, because if Dr. Charles Taylor had been commissioned by the Continental Congress he would not have forfeited his right to half-pay by accepting his position in the Guards, nor would he, when the regiment was discharged, have ceased to be in the service.

It is therefore contended by the defendants that in the absence of proof that the decedent was commissioned by the Continental Congress, it is to be presumed, in view of the circumstances under which the Guards were organized and the character of the organization, that the officers of the regiment were not only appointed but *commissioned* by the governor of Virginia.

In regard to the alleged error in Finding VIII, wherein it is stated that Colonel Taylor was commissioned as colonel of the Albemarle Guards, defendants insist that said finding was and is correct.

Under the resolutions of the house of delegates and the Continental Congress, the governor of Virginia was to appoint the officers of the regiment, and he was further empowered, with the council, to discharge the regiment even before the limited time of their enlistment had expired. Further, the decision in Dr. Charles Taylor's case would seem to be decisive upon the point that claimant's intestate must have been commissioned specially as colonel of the Albermarle Guards and not generally as colonel in the Continental service.

Second.—It is submitted that this court should not remit the record to the court below, to consider and determine whether the matters complained of were erroneous, because they are wholly immaterial in the case. An examination of the case in the court below will show that both the court and counsel for claimant understood the only questions in the case to be whether a portion of the men of Colonel Taylor's Regiment of the Guards re-enlisted for the war, and became soldiers in the Continental service, without the limitations attached to their original enlistment, under the resolution of January 9, 1779, and whether said regiment was reduced under and in pursuance of resolutions of October 3 and 21, 1779.

Counsel of claimant now contend that the case was misunderstood by the court below and the counsel of the claimant who tried the case in that court. They now insist that the question to be determined is whether Colonel Taylor continued in the service to the end of the war, and that the ultimate fact to be proven is the duration of his own personal service, and not the duration of the service of the private soldiers or any of them composing the battalion of the Guards which he commanded.

It is submitted that in view of these facts the court should not remit the record without being satisfied that the court below and the counsel of claimant were mistaken as to the issues involved in the case, and that if necessary an examination of the whole record should be made to ascertain whether the alleged matters complained of as erroneous are material.

Third. It is submitted that claimant has been guilty of a fatal lack of diligence in applying to have the findings of fact amended in the respects now complained of.

The case was decided in December term, 1879, of the Court of Claims. Motion of new trial was filed during the same term, but was not presented to said court until December term, 1886, seven years afterwards. Argument was then had, and the court below was asked to amend the findings of fact, and certain amendments were made and others refused, the motion for rehearing having been denied, and the opinion originally rendered having been continued as the opinion of the court in the case.

During all these years, and finally on the argument of the motion for a rehearing, no pretense was made by counsel of claimant that the findings of fact were erroneous in respect of the matters now complained of. Further, claimant appealed to this court; the record was prepared and filed in this court, as was brief of claimant's counsel and also defendants' brief.

After all this the present motion was filed. It is contended by the defendants that claimant's laches have been such as to disentitle him to a correction of the alleged mistakes.

This is really and in substance an application to this court to direct the court below to grant a rehearing of the case eight years after the decision of the case, and after a denial by the court below of a motion for a rehearing. It would seem to be quite clear that the court below, if the record were still in that court, would not under the circumstances entertain a motion for a rehearing, and it is submitted that this court should not, by granting this motion and remitting the record, require the court below to give further consideration to the case. To grant this motion would be contrary to the established practice of this court. (*McClure* v. *United States*, 116 U. S. R., 145, and cases cited; *Union Pacific Railway Co.* v. *United States*, *ib.* 154, 402.)

It is therefore submitted that the motion should be denied.

A. H. GARLAND,
Attorney-General.
ROBERT A. HOWARD,
Assistant Attorney-General.

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Office Supreme Court U.S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 957.

JOHN G. WILLIAMS, *administrator de bonis non* of the Estate of Francis Taylor, dec'd, *Appellant,*

vs.

THE UNITED STATES, *Appellee.*

Appealed from the Court of Claims.

MOTION.

And now comes the appellant, by P. E. Dye, his attorney, and says that he is advised, and verily believes, that the Court of Claims has fallen into error in the findings of fact in the above-named cause, and that said error is material to the due presentation of said cause in the findings of fact. He, therefore, moves this Honorable Court to make an order remitting the record to the Court of Claims, that the said Court of Claims may consider and determine whether or not there be error in said findings of fact in the particulars hereinafter specified, viz:

1. In Finding 2, whether the words, "by the Governor of Virginia," should not be stricken out.

2. In Finding 8, line 4, whether the words, "by the Governor of Virginia," should not be stricken out.

3. In Finding 8, last paragraph of printed page 9, line 3, whether the words, "of the Albemarle Guards," should not be stricken out.

And, also, that said Court of Claims consider and determine whether any other findings of fact or conclusions of law are essential to the proper presentation of the case upon the appeal.

JOHN G. WILLIAMS, *Adm'r.*

P. E. DYE, *Attorney for Claimant.*
GEORGE S. BOUTWELL, *Of Counsel.*